Central Law Journal.

ST. LOUIS, MO., APRIL 19, 1907.

PROCEDURE NOT A LOCAL MATTER.

The idea has gone forth that procedure is a local matter, therefore is not an affair for general consideration. The result of such teaching is, that, there has come to be a general jangle from the very efforts of men like David Dudley Field, which, had they been understood and thus put into action, would have brought a beautiful harmony in the laws of every state and between every state impelling a federal procedure into tune by the sonorous symmetry of the concord. But what have we? We find the answer in Poe's poem "The Bells:"

> "Hear the loud alarum bells—brazen bells;
> What a tale of terror now their turbulency tells,
> In the startled air of night,
> How they scream out their affright,
> Too much horrified to speak,
> They can only shriek, shriek, shriek—out of tune."

We do not know how to represent the idea that pleading must follow laws which are from everlasting to everlasting, than by taking a passage from Story on Equity Pleading, and comparing it with one from a later author, who is greatly responsible for the idea so prevalent that pleading is a local affair and in nowise affected by the great *datum posts*, which, shedding a glorious light over the fields of legal learning, have directed the paths of the Masters of all ages.

Story says: "But whatever may be the object of the bill, the first and fundamental rule always indispensable to be observed, is, that it must state a case within the appropriate jurisdiction of a court of equity. If it fails in this respect, the error is fatal in every stage of the cause, and can never be cured by any waiver or course of proceeding by the parties; for consent cannot confer a jurisdiction not vested by law. And although many errors and irregularities may be waived by the parties, or be cured, by not being objected to, the court itself cannot act except upon its own intrinsic authority in matters of jurisdiction; and every excess will amount to usurpation, which will make its decretal orders a nullity, or infect them with ruinous infirmity." Sec. 10, Story's Equity Pleading, 10th Ed.

Thompson says: "The object of pleadings being merely to notify the opposite party of the ground of the action or defense, if the party comes into court, it is not perceived why he may not waive the notice as in every other case, although the pleading may not advise him of the case or defense which is actually tendered in the evidence. Several of the best courts of the country proceed upon this enlightened view. The sound view is believed to be that the instructions have no connection with the pleadings except through the evidence. The jury find from the evidence not from the pleadings. * * * So is the judge to instruct the jury upon the whole evidence or is he to limit his instructions to so much of the evidence as is within the scope of the pleadings. The proper answer is believed to be this: If neither party has objected to the evidence of the ground of variance, the judge is to instruct the jury on the whole of the evidence, the rule being that a variance between the pleadings and the evidence is no ground of error, unless the evidence was objected to upon this ground at the time it was offered." Thompson on Trials, 2310-2311.

Thompson was not a maxim man, but belonged with that class which says: "To Hades with the maxims." Those who have followed the leaders of this extraordinary assumption find themselves at sea without rudder or compass and the states wherein this heresy has taken root have lost whatever of jurisprudence they had established, and for the life of them they do not know what the matter is. If they had learned the fourteen conserving principles of procedure expressed in the maxims, they would have had no trouble at all and would not have been saying, "to Hades with the maxims," where their jurisprudence is now to be found as a result of its failure to be guided by them. This might be called proxy. The maxims are from everlasting to everlasting because they are self-evident truths, without which government cannot exist and with which there is no need of a written constitution and which must be regarded as existing wherever there is a written constitution, a thing thoroughly understood by Marshall. England has no constitution other than the conserving principles found in them. The conserving principles of the British government did not come from Hades, because they are eternal truths, and

no beneficent government can exist without them. Guided by the maxims Cicero, Bacon, Mansfield, Story, Kent, Marshall and Field, and many other profound jurists of all time, would have identically the same idea of procedure. The best expression of their idea to be found any where is the English judicature act. The territories which are growing into states can not do a better thing for them than to adopt the English judicature act, just as the state of Connecticut has. They should insist on every judge learning the maxims and get the idea so deeply impressed upon the minds of the people that the best way to have good government is to be able to secure the services of their ablest good men on the bench particularly.

Turning back to the examples, the Thompson idea has taken root in New York, Indiana, Illinois, Missouri, and Colorado, and some of the territories. Of late Missouri has emphatically repudiated it. In these states we find the worst conditions relative to their jurisprudence with constantly increasing opinions in which principles are neglected. Other states are more or less infected with this heresy. Massachusetts which has adhered to the rule laid down by Judge Story, above quoted, is regarded as having the best common law decisions of all the states. Connecticut today is doing fully as good work as Massachusetts and Florida, North Carolina, Wisconsin and many others of the eastern and southern states have been keeping close to this, consequently have not been so frequently misled by the flood of case law with which the land is deluged. One of the great features of the English judicature act is that the judges determine the rules of procedure and not parliament. One of the worst features of state government is, that the legislatures are given power to regulate procedure and have demonstrated the fact that a "little knowledge is a dangerous thing." It would seem as though enough had transpired to arouse the bar of the country to determined action. Our great law schools which have been absolutely unmindful of the importance of the greatest matters a lawyer must consider, should be stirring in the matter of a uniform procedure, which is nothing more than the logic of well settled principles, and abandon the heresy they have been spreading abroad, that procedure is a local matter.

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE—TELEPHONE WIRES LEFT IN HOUSE AFTER TERMINATION OF CONTRACT WHEN CONDUCTING LIGHTNING INTO HOUSE CAUSING DAMAGE, QUESTION ONE FOR JURY.—The case of Evans v. Eastern Telephone & Telegraph Co. (Ky.), 99 S. W. Rep. 936, is interesting and novel and should serve as a warning to telephone companies leaving wires in a house after termination of contracts. It appears from the opinion of Hobson, J., that Lewis Evans owns a house and lot in the town of Proctor, Lee county, Ky. In August, 1902, he made a contract with the Eastern Telephone & Telegraph Company by which it placed a telephone box in his house connected by wire to the defendant's exchange, and he agreed to pay it the sum of $1 a month for a period of 12 months for the use of the telephone. At the end of the year he notified the telephone company to remove the telephone box and wires from his house. It took out the telephone box but failed to remove the wires, simply cutting them loose from the telephone box and leaving them in the house. Thus things stood until July 10, 1904, when there was a severe thunderstorm and the lightning struck a locust tree not far from Evans' house to which the wire of the telephone company was attached. The lightning tore up the tree and passed along the wire into the house, tearing up the room in which the wires had been left and damaging the property. The wires had remained in his house about 10 months after the telephone box was taken out before the house was struck by lightning. During this time Evans knew that the wires were still in the house, but did not request the telephone company to take them out, not knowing that it was dangerous for the wires to remain attached to the house after the box had been taken away, this being the first experience he ever had with a telephone. He sued the company for damages to the house, charging that the loss was due to its negligence. The defendant filed an answer denying the allegations of the petiton. On the trial the plaintiff proved, in substance, the facts stated. The court peremptorily instructed the jury to find for the defendant. This was done, and, judgment having been entered dismissing the plaintiff's petition, he appealed. The court said: "It is insisted that the loss was due to the act of God, and that the plaintiff was as much responsible for the trouble as the defendant. While lightning is the act of God, the carrying of the lightning in the plaintiff's house on its wire which it had left in the house was the act of the defendant, and it was a question for the jury whether the defendant had used such care as might be reasonably expected of a person of ordinary prudence under the circumstances. The plaintiff had ordered the defendant to take out both the box and the wires, and it was a question for the jury whether he, by his want of care, contributed to the loss, or acquiesced in the wires remaining

in the house when he knew, or by ordinary care should have known, the danger. He had once notified the company to take out the box and the wires, and, though he knew that they had not complied with his request, he may not have known that they had so left the wires as to be a source of danger. In 27 Am. & Eng. Ency. of Law, 1017, the rule is thus stated: In placing wires for conducting electricity into a house, a telephone company owes the persons living there the exercise of reasonable care, proportioned to the known dangers of the conditions, to prevent the wires acting as conductors of lightning into the building, and it is liable for damage resulting from neglect to provide against this danger. Especially is it liable where damage from lightning occurs through its failure to remove its wires when the person living in the house has ceased to subscribe for a telephone."

WHAT CONSTITUTES MALICIOUS MISCHIEF?—HARMLESS ERROR.—The case of Davis v. Chesapeake & Ohio Ry. Co. (W. Va.), 56 S. E. Rep. 400, presents some interesting features. The appeal was taken by the railway company to recover a judgment for $900, which was the award of a jury. The facts in the case show that the plaintiff (Davis) on the 9th day of February, 1904, became passenger at Huntington, W. Va., on train No. 6 of the defendant company, running east through Kanawha and Fayette county. That he bought a ticket to Malden, in Kanawha county. That afterwards he decided to continue his journey to Paint Creek Junction, in said last-named county. That he was unacquainted with the location of Paint Creek Junction. That he did not hear the name of that station called, and did not get off of the train at that point. That, after passing that station, the conductor requested payment of additional fare from the plaintiff. That plaintiff said he had paid his fare, and refused to pay additional fare, and requested the conductor to let him get off of the train. That the conductor then placed plaintiff under arrest, and in charge of the brakeman and pumpman, employees of the defendant company. That at Handley, in Kanawha county, the plaintiff asked those (or one of them) in charge of him, the conductor not then being in the car, to let plaintiff get off of the train, saying: "If you will let me off, I will walk back. I will pay you to Handley." That the plaintiff was not permitted to get off the train at Handley. That he was then taken on the train to Montgomery, in Fayette county, and turned over to the chief of police of that town, by the conductor or by his direction. That plaintiff was placed by the chief of police in the "lockup" in said town until the next day, when the same train again arrived at Montgomery. That plaintiff was then brought before the mayor of said town and tried, the conductor appearing against him, and fined $10, and sentenced to imprisonment for 10 days. That plaintiff was then placed in said "lockup," and on the next day again brought before the mayor, discharged, and his fine remitted. In some particulars the evidence is conflicting. The conductor testified that while the train was at Paint Creek Junction he said to plaintiff: "This is your station," and that plaintiff replied: "No, it ain't. I know the road. This ain't Paint Creek." The conductor, when asked for the reason why he took plaintiff (and another with him) to Montgomery, after leaving Paint Creek, said: "To get fare if they were going to ride. Lots of people get on and pay to a station, and then do not get off at that station." There are other features of the evidence which it is unnecessary to detail.

There was a demurrer to the declaration, which was overruled. The declaration contains but one count. No point was made in argument in this court on the demurrer, and the declaration seems to be entirely sufficient as a declaration for false imprisonment. Two grounds are relied on by defendant for reversing the action of the trial court in refusing to set aside the verdict and award a new trial. They are: (1) That the court misdirected the jury in giving instruction No. 1 for plaintiff; (2) that the damages found by the jury are excessive.

Instruction No. 1, for the plaintff, is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff, without just cause, was arrested after he became a passenger on one of the defendant's trains, and during the time that he was on such train, either by the conductor in charge of such train, or by another employee of the defendant by order of the said conductor, that the act of the conductor, or of said employee acting under the orders of said conductor, was the act of the defendant, the Chesapeake & Ohio Railroad Company."

The defendant contends that the question presented is this: "Had the conductor reasonable grounds to believe that the plaintiff was trying to beat his way without paying fare?" And some of the defendant's instructions were based on that theory. Viewing the evidence in the most favorable light for the defendant and assuming that the plaintiff fraudulently continued on the train, refusing to pay fare (which we do not decide), of what criminal offense was there probable cause to believe him guilty? If the plaintiff fraudulently remained on the train refusing to pay fare, he became a trespasser, and might have been ejected from the train in a proper manner; no more force being used than was necessary for that purpose. Grogan v. C. & O. Ry. Co., 39 W. Va. 415, 19 S. E. Rep. 563; Moore on Carriers, 553, 747. It does not follow that, because the plaintiff was a trespasser in the eye of the law relating to a civil action for damages against him, he was guilty of a criminal offense. Various offenses relating to railroads and railroad property are provided by statutes, such as trespassing upon any railroad car by jumping on or off thereof (section 31a, ch. 145, Code 1906); maliciously destroying, removing, or injuring railroad property

(section 26, same chapter); riotous and disorderly conduct (section 31, same chapter). Others might be mentioned. It was not pointed out in argument, nor does it appear from our examination, that the facts in this case constituted probable cause to believe that plaintiff had committed an offense under any of the statutes relating specially to railroads or railroad property. Section 27, ch. 145, Code 1906, provides that if any person unlawfully, but not feloniously, "take and carry away or destroy, injure or deface any property, real or personal, not his own, he shall be guilty of a misdemeanor and fined," etc. The previous Virginia statutes, on this subject, as well as the one under consideration, like the statutes of many of the other states, probably grew out of the common-law offense of malicious mischief. 19 Am. & Eng. Enc. Law, 639. See Dye's Case, 7 Grat. (Va.) 662; Henderson's Case, 8 Grat. (Va.) 708, 56 Am. Dec. 160. So much of our statute as relates to the taking and carrying away, destroying, or defacing property does not apply to this case, under the evidence.

It may, however, be argued that the plaintiff, by fraudulently remaining on the train and refusing to pay fare, was guilty of the offense of injuring property not his own, under the statute. According to the great weight of authority, to constitute the offense at common law of malicious mischief for injuring property, the extent of the injury must be such as to impair utility or diminish value. 2 Whart. Crim. Law, § 1074; 2 Bish. Crim. Law, § 992; State v. Watts, 48 Ark. 56, 2 S. W. Rep. 342, 3 Am. St. Rep. 216; Wait v. Green, 5 Parker, Cr. R. (N. Y.) 185; State v. Robinson, 20 N. Car. 130, 32 Am. Dec. 661; State v. Cole, 90 Ind. 112, 19 Am. & Eng. Enc. Law, 638. See, also, Dye's Case and Henderson's Case, *supra*. In a civil action for the recovery of damages, some degree of injury will be implied (28 Am. & Eng. Enc. Law, 555); but such is not the case as to malicious mischief for injuring property at common law. Our statute uses the word "injure." By the use of this word it would seem reasonable to suppose that the legislature intended the extent of the injury to be the same as required at common law. We conclude that such was the intention of the legislature, and that it was not intended by the statute to provide a criminal offense for every act which would constitute a trespass in a civil action for damages. See Dye's Case, *supra*.

NEGLIGENCE IN THE USE OF AUTOMOBILES.

1. *Right of Automobiles to Use Highways.*—It is now a well established principle of law that streets and highways are subject to new uses, or to the use of new and novel methods of travel. The rule now obtains that highways may be devoted to the constant changing and to all the increased variety of vehicles that may be devised. Travelers are no longer confined to the use of vehicles propelled by animal power; the highways and streets are not for the exclusive use of such means of transportation. The law presumes that when highways and streets are laid out and dedicated to the public that it was in contemplation of the use of new and improved means of locomotion, whenever the general benefit of the public required it. These new and improved means of transportation over the highways cannot be excluded merely because such use tends to the inconvenience or even to the danger of persons who continue the use of former methods. The bicycle and the automobile now have the same rights on the highways as the ox-team or the mule-cart.[1] This principle was well stated by the Supreme Court of Michigan before automobiles were in use, in the following language: "Persons making use of horses as means of travel or traffic by the highways have no rights therein superior to those who make use of the ways in other modes. It is true that locomotion upon public roads has hitherto been chiefly by means of horses and similar animals, but persons using them have no prescriptive rights, and are entitled only to the same reasonable use of the ways which they must accord to all others. Improved methods of locomotion are perfectly admissible if any shall be discovered, and they cannot be excluded from the existing public roads, provided their use is consistent with the present methods.[2] On the question of the right of automobiles to use the highways the Supreme Court of Indiana, in a very recent case said: "The law does not denounce motor carriages, as such, on the public ways. For so long as they are constructed and propelled in a man-

[1] Bogue v. Bennett, 156 Ind. 478, 60 N. E. Rep. 143, 83 Am. Dec. 212; Macomber v. Nichols, 34 Mich. 212, 22 Am. Dec. 522; Mason v. West, 61 App. Div. (N. Y.) 40, 70 N. Y. Supp. 478.

[2] Macomber v. Nichols, 34 Mich. 212, 22 Am. Dec. 522. See also Laufer v. Traction Co., 68 Conn. 475, 37 Atl. Rep. 379; Knight v. Lanier, 69 App. Div. (N. Y.) 454, 74 N.Y. Supp. 999; Chicago Dock, etc., Co. v. Garrety, 115 Ill. 155, 3 N. E. Rep. 448; Deance v. Lake St., etc., R. Co., 165 Ill. 510, 46 N. E. Rep. 520, 56 Am. St. Rep. 265, 36 L. R. A. 97; Fulton v. Short Route R., etc., Co., 85 Ky. 640, 4 S. W. Rep. 332; Louisville Bag, etc., Co. v. Central, etc., R. Co., 95 Ky. 50, 23 S. W. Rep. 592, 44 Am. St. Rep. 203; Elliott Roads and Streets, § 851.

ner consistent with the use of the highways, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use to occupy the streets and roads. Because, novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to seeing them is no reason for prohibiting their use. In all human activities the law keeps up with the improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided, the contrivance is compatible with the general use and safety of the road."[3]

2. *Limitation on Right to Use Highway.*—This right to use the highway for new and novel, or improved modes of travel, is subject to the limitation that the right must be exercised so as not to destroy the rights of others or exclude them from the use of the public ways. The right of one person to an unusual or peculiar use of a highway must be reasonably consistent with the right of all other persons in their use of such highway. The principle of this limitation was expressed by the Rhode Island court thus: "The defendant had the right to transport his machinery over the highway; and as was stated by way of illustration, any person has a right to transport over the highways elephants and animals which might frighten horses. So, also, loads of goods which, from their height or appearance or the noise made in transport, might terrify some horses. This right is undoubted, but it is to be so exercised as not to endanger the lives or property of others who have equal rights upon the highway.[4]

3. *Legislative Control Over Use of Automobiles.*—For obvious reasons the legislatures of most of the states have passed statutes regulating the speed and management of automobiles upon the highways. The courts are practically unanimous in holding that states and municipalities have power to regulate the driving of these machines upon the streets and public ways. In upholding the validity of such a statute the Supreme Court of Massachusetts said: "There can be no question of the right of the legislature, in the exercise of the police power, to regulate the driving of automobiles and motor cycles on the public ways of the commonwealth. They are capable of being driven at such high rate of speed, and when not properly driven are so dangerous as to make some regulation necessary for the safety of other persons on the public way."[5]

4. *Duty And Degree of Care Required.*—The rule of law as to the duty and degree of care required of drivers of automobiles is not different either in nature or degree from the rules regulating the use of other machinery, vehicles or engines. In a case already cited, this rule was stated thus: "As in other cases of the use of a dangerous article, the required degree of care increases with the danger to be apprehended from the use of it, and from exposure to it. * * * The man, who claiming to be in the exercise of his own right, to drive along the highway an object, or animal, which from its appearance, noise or other offensiveness, is calculated to frighten horses, without taking precautions by having a sufficient number of persons in charge of it to warn others of the danger, and if need be, to aid them in passing, for women and children have a right to drive on the highway as well as men, or who leaves such an object on the highway without proper precaution, cannot be said to be using that due care he ought to use, and which the law and a proper regard for the lives of his fellow men and the common duty of humanity required of him."[6]

The New York Supreme Court, stated the rule thus: "The rules governing the degree of care which individuals upon the highway should exercise for mutual safety are well settled and related in their application to the danger to be reasonably apprehended under ever varying conditions or exposure and peril. While the automobile is a lawful means of conveyance, and has equal rights upon the roads with the horse and carriage, its use cannot be lawfully countenanced unless accompanied with that degree of prudence in management and consideration for

[3] Indiana Springs Co. v. Brown (Ind.), 74 N. E. Rep. 615, 1 L. R. A. (N. S.) 238.

[4] Bennett v. Lovell, 12 R. I. 166, 34 Am. Dec. 628.

[5] Commonwealth v. Boyd (Mass.), 74 N. E. Rep. 255; People v. Schneider (Mich.), 103 N. W. Rep. 172.

[6] Bennett v. Lovell, 12 R. I. 156, 34 Am. Dec. 628.

the rights of others which is consistent with safety."[7] The Supreme Court of Indiana expressed the rule more fully, as follows: "As drivers about to meet on the road, each owed the other the reciprocal duty to conduct himself and conveyance in a manner to avoid placing the other in jeopardy. And when the defendant saw the plaintiff's horse had become frightened at the rapid approach of the strange, noisy carriage, and that plaintiff was in danger, * * * it was the highest moral, as well as legal duty of the defendant, to stop and remove the plaintiff's peril rather than increase it by rushing onward. Will anyone seriously say that the driver of such automobile, recently brought to the vicinity, may speed it at twenty miles an hour along the highway towards approaching harnessed horses puffing and whirring so as to be heard several hundred yards away, and, seeing a horse hitched in front of him, hitched to a buggy, rearing, plunging and trying to bolt from the road without any other apparent cause, is justified in maintaining his speed because he does not know what it is that causes the horse's fright? Such contention is not argument. Any reasonable chauffeur, inclined to respond to the simplest phases of humanity, would not think of circumscribing his conduct under such circumstances by the rules of law, even if such rules lead to the absurd limits suggested. The law of the road does not tolerate any such inconsiderate and reckless disregard of the rights of other travelers on the highway."[8]

This rule as to the degree of care was stated by the Supreme Court of Kentucky, thus: "While automobiles are a lawful means of conveyance, and have equal rights upon the public roads with horses and carriages, their use should be accompanied with that degree of prudence in management, and consideration for the rights of others which is consistent with their safety. If, as the jury found by their verdict, appellee knew, or could have known by the exercise of ordinary care, that the machine in his possession and under his control had so far excited appellee's horse as to render him dangerous and unmanageable, it was his duty to have stopped his automobile and taken such other steps for appellee's safety as ordinary prudence might suggest."[9]

5. *Statutory Duty of Chauffeur.*—Many of the states now have statutes prescribing the duties of a chauffeur on meeting horses on the highway. These are made to apply especially where the team is frightened, or where the driver of the team signals the chauffeur to stop his machine. There is great similarity among these statutes. Generally they require the person driving an automobile, at request or signal by putting up the hand, from the person driving or riding a restive horse or horses, or driving domestic animals, to cause the machine to stop immediately and remain stationary, and upon request shall cause the engine to stop running long enough to allow the horse or team to pass. The provisions apply to automobiles going in the same or in opposite directions. Such statutes are found in the recent acts of Alabama, California, Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana, Iowa, Kansas Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, Washington, Wisconsin, and in England. From the statutes of the various states, and from the adjudicated cases a general rule as to the duty of a person driving an automobile on a highway may be deduced to the effect, that the chauffeur must manage and control his machine with the care and prudence that is consistent with the safety of others lawfully using the highway; and when he sees or knows, or by the exercise of ordinary care might know, that his automobile by reason of its unusual and peculiar construction, or by reason of the peculiar noise, smoke or vapor that it emits, or by reason of the rate of speed at which it is driven, is frightening the horse or team of another using the highway, and that such horse or team will become unmanageable and is likely to injure the persons in the vehicle drawn by the horse or team, it is his duty to stop his automobile immediately and give the other person reasonable time in which to extricate himself from any probable injury likely to be occasioned by reason of

[7] Knight v. Lanier, 69 App. Div. (N. Y.) 454, 74 N. Y. Supp. 999; Banks v. Braham (Mass.), 74 N. E. Rep. 594.

[8] Indiana Springs Co. v. Brown (Ind.), 74 N. E. Rep. 615, 1 L. R. A. (N. S.) 238.

[9] Shinkle v. McCullough, 116 Ky. 960, 77 S. W. Rep. 196.

the fright of the horse or team.[10] It will be observed that this general rule does not permit the chauffeur to wait for a signal from the driver of a frightened horse. If the horse is frightened, and this may be seen, it is the duty of the chauffeur to stop. The statutory rule requiring a signal to be given applies where the driver of a horse has reason to believe that the horse will become frightened, but the operator of the automobile may not yet be so advised by observation.

6. *Duty of Chauffeur Toward Person in Street.*—The duty of drivers of automobiles toward persons in the street is governed by the same rules as other persons driving horses and steam or electric cars in a street or highway. The general rule is that when a driver of such carriages by the exercise of a proper lookout, either knows, or should have known that a child of tender years, or a person in a somewhat helpless condition is in a position of disadvantage in the street and seemingly unable to avoid a collision, the chauffeur is required to exercise increased care in order to avoid inflicting injury upon such child or person.[11] Pedestrians, adults and infants, have the right to assume that a person in charge of an automobile will exercise care and respect their rights, when he turns the corners of a street. Due care at such a time requires that the machine be slowed down and operated under control. The chauffeur is bound to take notice that people will be at the crossing or entering thereon, and the pedestrian has the right to assume that the operator of the machine will discharge this obligation.[12] It was held to be the duty of a chauffeur to take notice of and respect the rights of a person standing in the roadway talking with another person who was sitting in a carriage;[13] and he is bound to know that a person may step from the running board or steps of a street car into the street, and in such case he must be prepared to avoid a collision.[14]

[10] Indiana Springs Co. v. Brown (Ind.), 74 N. E. Rep. 15, 1 L. R. A. (N. S.) 148; Shinkle v. McCullough, 116 Ky. 960, 77 S. W. Rep. 196; Gifford v. Jennings (Mass.), 76 N. E. Rep. 233; Mason v. West, 61 App. Div. (N. Y.) 40, 70 N. Y. Supp. 478.

[11] Thiest v. Thomas, 74 N. Y. Supp. 276.

[12] Buscher v. New York Transp. Co., 106 App. Div. (N. Y.) 493, 94 N. Y. Supp. 798; Hennessey v. Taylor (Mass.), 76 N. E. Rep. 224.

[13] Kathmeyer v. Mehl (N. J.), 60 Atl. Rep. 40.

[14] Cæsar v. Fifth Ave. Coach Co., 4 Misc. (N. Y.) 331, 90 N. Y. Supp. 359.

7. *Negligence.*—The rule as to the liability for negligence for injuries occasioned by improper use of highways was established before automobiles came into use. But the rule then established applies to these machines with peculiar fitness. The primary rule is that the right of recovery for an injury to one using a highway by the old or ordinary means of travel occasioned by a person using a new or improved method depends entirely on the question of negligence, or its equivalent, the want of due care.[15] Negligence in operating an automobile on a street or highway, it has been held, may consist in the high rate of speed at which the machine is being operated, in being on the wrong side of the road, or the failure to give warning of its approach by sounding a whistle, bell or gong.[16]

8. *Master and Servant.*—The general rules as to the liability of the master for the negligence of the servant apply to the use and management of automobiles. If an injury is inflicted on another without his fault, by the negligence of a servant who is operating an automobile, the master is liable. The appellate division of the New York court approved an instruction on this subject which was as follows: "If the jury find either that the defendant left the automobile in charge of his son to take it home, or in charge of his son and coachman together to take it home, or in charge of the coachman alone, and the coachman neglected his duty in that regard, and allowed the son to run the machine, and by the negligence of the son the accident occurred, without contributory negligence on the plaintiff's part, then in either case defendant is responsible and liable for that negligence and its consequences."[17]

It is held sufficient to make out a *prima facie* case to show that the defendant was the owner of the machine and that the driver was employed by him to operate it.[18] So it was held sufficient to charge the owner with the negligence of his servant or employee where the evidence showed that the owner directed such

[15] Macomber v. Nichols, 34 Mich. 212, 22 Am. Dec. 522.

[16] Collard v. Beach, 81 App. Div. (N. Y.) 582, 115 N. Y. St. 619, 81 N. Y. Supp. 619; Gifford v. Jennings (Mass.), 76 N. E. Rep. 233.

[17] Collard v. Beach, 81 App. Div. (N. Y.) 582, 115 N. Y. St. 619, 81 N. Y. St. 619; Curley v. Electric Vehicle Co., 68 App. Div. (N. Y.) 18, 74 N. Y. Supp. 359.

[18] Stewart v. Baruch, 93 N. Y. Supp. 161.

employee to accompany the operator of an automobile for the purpose of instructing and assisting him in operating it.[19] But there can be no liability where the relation of master and servant does not exist. It is not sufficient to prove that the defendant was the owner of the machine, where the proof shows that it was driven by a third person at the time of the alleged injury. The Supreme Court of Iowa held that the owner was not liable for the injuries resulting from negligence in the driving of an automobile by his son. The evidence showed that the son, who was in his father's employ, on a day given him as a holiday, took the father's automobile from his place of business without his knowledge or consent, and while driving it in a negligent manner caused a team of horses to take fright and run away thereby injuring the driver.[20] And in a case where the defendant's chauffeur was called by the plaintiff to prove the relation of master and servant, and he admitted on cross-examination that at the time of the accident he was using the machine for his own purposes and in violation of the defendant's orders, it was held that under this admission there could be no recovery.[21]

9. *Negligence Within Permitted Rate of Speed.*—Many statutes and city ordinances permit automobiles to be driven not to exceed a certain rate of speed. Where an injury was occasioned while a machine was being driven within this permitted rate of speed, it was insisted there was no negligence and that there could be no recovery. It was held, however, that it is no defense to a charge of negligence to show that at the time of the alleged injury the machine was being driven within the permitted speed. This question was disposed of by the New York court thus: "No owner or operator of an automobile is therefore exempt from liability for collision in a public street, by simply showing that at the time of the accident he did not run at a rate of speed exceeding the limit allowed by law or ordinance. On the contrary * * * he still remains bound to anticipate that he may meet persons at any point in a public street, and he must keep a proper lookout for them, and keep his machine under such control as will enable him to avoid a collision with another person also using proper care and caution. If necessary, he shall slow up, and even stop. No blowing of horn or of a whistle, nor ringing of a bell or gong, without an attempt to slow the speed, is sufficient, if the circumstances at a given point demand that the speed should be slackened, or the machine stopped, and such a course is practically, or, in the exercise of ordinary care and caution proportionate to the circumstances, should have been practicable. The true test is, that he must use all the care and caution which a careful and prudent driver would have exercised under the same circumstances."[22]

Statutes granting and regulating the use of highways and streets may protect a person in the proper use of the highway, but do not shield him from the result of his own negligence in the exercise of that right as against another person. This proposition was established by the Rhode Island court under a statute regulating the use of highways before automobiles were invented. In construing the statute as a defense in an action for negligence the court said: "That act may indeed protect the party from being indicted for a public nuisance, but could not protect him from the consequences of his negligent exercising his rights as against other persons."[23]

10. *Intervening Agency.*—The principles of proximate and remote cause apply in the use of automobiles. If the injury complained of was caused by an intervening agency there can be no recovery. This principle was applied in a case where a chauffeur left his machine standing in the street while he entered a building to deliver parcels; he turned off the power and set the brake; in his absence two boys wilfully started the machine by reason of which an injury resulted to a third person. On appeal of an action for damages the court suggested that in such a case it was not the duty of the chauffeur to chain his machine to a post, or to fasten it so that it would be absolutely impossible for a third person to start it. Only reasonable care was to be exercised in such a case. But when a statute requires a certain manner of locking a machine it must be complied with.[24]

[19] Parker v. Homan, 88 N. Y. Supp. 137.

[20] Reynolds v. Buck (Iowa), 103 N. W. Rep. 946; Clark v. Buckmobile, 94 N. Y. Supp. 771.

[21] Quigley v. Thompson, 211 Pa. 107, 60 Atl. Rep. 506.

[22] Thies v. Thomas, 77 N. Y. Supp. 296.

[23] Bennett v. Lovell, 12 R. I. 156, 34 Am. Dec. 628.

[24] Burman v. Schultz, 40 Misc. (N. Y.), 212, 84 N Y. Supp. 292.

11. *Negligence — Illustrations.* — Where a horse became frightened at an approaching automobile, the driver got out of the vehicle, motioned the driver of the automobile with his hand and held the horse by the bit; the automobile stopped but started again toward the horse; as it approached the horse became unmanageable, reared and plunged while the driver struggled to control it; the automobile was kept going, passing near the horse, not turning away from it at all. The horse in its fright turned the vehicle in the ditch and the plaintiff was injured. It was held that a finding of negligence was justified.[25] The driver of an automobile was held liable for negligence where it appeared that his machine struck a street car conductor who had stepped from one end of his car into the street to pass to the other end; that in doing this he had a right to rely upon the exercise of reasonable care by drivers of vehicles and that it was the duty of the driver of the automobile either to halt or turn from his course into the open space on his right and thereby avoid the collision.[26] In an Illinois case it appeared that the automobile was running at a high rate of speed on an unobstructed road where the driver of the machine could easily have seen the approaching team. On the question of the driver's negligence the court said: "The jury were justified in concluding that, if he did not see the team approaching, he could have done so by the exercise of ordinary prudence and care. The evidence is of such a character, too, that the jury were justified in believing that the appellant saw that the horses were frightened by the approach of his machine. This being so, it was his duty to stop his automobile. But the evidence is that he did not do so, nor did he slacken its speed, but proceeded upon his way without taking any notice whatever of the parties in the wagon who were injured. The statute does not contemplate that the driver of an automobile can proceed until a team turns over the wagon and runs away, but it intended to prevent such occurrences."[27] The New York Appellate Division by a divided court held that the evidence was insufficient to show negligence on the part of the driver of an automobile, where it was left doubtful that the rate of speed was excessive and where it further appeared that the boy who was struck stepped suddenly out from behind a mass of building material and that the driver had perfect control of his machine.[28] A charge that the defendant was running his automobile at a high rate of speed and negligently and with great violence drove the machine against plaintiff's horses and caused them to run away, was held not to be supported by proof that the defendant was driving his automobile at a reasonable speed but failed to stop when he discovered that the plaintiff's horses were frightened and about to run away.[29] The Supreme Court of Indiana held it to be sufficient evidence of negligence where it was shown by the evidence that an automobile was driven along a highway at the rate of twenty miles an hour, making a noise that could be heard several hundred yards away, and the driver, seeing a horse in front of him hitched to a buggy, rearing and plunging, without any other apparent cause, failed to stop the machine or even slacken the speed, and the fright of the horse resulted in upsetting the buggy and injuring the occupants.[30] The Supreme Court of Massachusetts held that there was sufficient evidence where it appeared that the plaintiff was driving a gentle horse at the rate of four miles an hour, hitched to a market wagon, and in the exercise of due care, that the defendant in his automobile approached from the rear without giving any signal and without attracting any attention until within a few feet of the plaintiff's wagon, and undertook to pass the plaintiff where there was not sufficient room, by reason of which the plaintiff's horse became frightened and in his fright kicked and injured the plaintiff.[31] The same court held that the charge of negligence was sustained where the evidence showed that the plaintiff, a woman, after signalling a street

[25] Murphy v. Wait (N. Y. App. Div.), 92 N. Y. Supp. 253.

[26] Cæsar v. Fifth Ave., etc., Co., 90 N. Y. Supp. 359.

[27] Christy v. Elliot (Ill.), 74 N. E. Rep. 613, 1 L. R. A. (N. S.) 215; Banks v. Braman (Mass.), 74 N. E. Rep. 594; Gifford v. Jennings (Mass.), 76 N. E. Rep. 233; Hennessey v. Taylor (Mass.), 76 N. E. Rep. 224; Murphy v. Wait (N. Y. App. Div.), 92 N. Y. Supp. 253; Spina v. New York Trans. Co. (N. Y. App. Div.), 96 N.Y. Supp. 270.

[28] Polsky v. New York Trans. Co., 88 N. Y. Supp. 1025; Stewart v. Baruch, 93 N. Y. Supp. 161.

[29] Troutbrook Ice, etc., Co. v. Hartford Electric, etc., Co. (Conn.), 59 Atl. Rep. 405.

[30] Indiana Springs Co. v. Brown (Ind.), 74 N. E. Rep. 615, 1 L. R. A. (N. S.) 238.

[31] Gifford v. Jennings (Mass.), 76 N. E. Rep. 233.

car and as it approached and stopped, started to walk from the sidewalk to the street car track and when passing across the street was struck and injured by the automobile of the defendant; and where it appeared that the plaintiff was seen by the defendant when his machine was at a distance of fifty feet from her and he knew that she had signalled the car and was about to cross the street to board it.[32]

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[32] Hennessey v. Taylor (Mass.), 76 N. E. Rep. 224.

TORRENS SYSTEM OF TITLE REGISTRATION—SETTING ASIDE REGISTRATION OBTAINED BY FRAUD.

BAART v. MARTIN.

Supreme Court of Minnesota, Aug. 31, 1906.

When the registration of the title to land is secured by fraud, and the owner of the land is not notified, as required by the statute, the decree and the certificate of registration issued thereunder, may be vacated and set aside, unless an innocent purchaser for value has obtained rights on the faith of the record.

As long as the title remains registered in the name of the person guilty of the fraud, the decree and certificate of registration may be set aside, in an action brought by the defrauded party within a reasonable time after notice of the fraud.

The mere fact that the statute does not in express words except fraud does not deprive a court of equity of the general jurisdiction to protect parties from the consequences of fraud.

STATEMENTS OF FACTS.—On September 27, 1897, Katherine Martin and Michael Martin made their promissory note, whereby they promised to pay to Casper Ernst, or order, $1,850, on the 27th day of September, 1900. To secure the payment of this note, the Martins executed and delivered to Ernst a first mortgage on lot 1 block 4 in Morrison's addition to Minneapolis. The mortgage was recorded in the office of the register of deeds for Hennepin county on the 2d day of November, 1897. The note and mortgage were assigned by Ernst to the respondent, Baart, and the assignment was duly recorded in the office of the register of deeds on August 27, 1898. The papers were thereafter in the respondent's possession at his home in Michigan until the commencement of this action. The time of payment was extended, and the interest on the note was regularly paid to respondent up to September 27, 1903. The respondent has resided at Marshall, state of Michigan, since 1883. On January 31, 1899, Casper Ernst, or some person in his behalf, forged respondent's name to a power of attorney to A. Mueller, an employee of Ernst, purporting to authorize Mueller to foreclose the Martin mortgage. Acting under this forged power of attorney, Mueller went through the form of foreclosing the mortgage because of an alleged default in the payment of interest, amounting to $74, due on the 27th day of September, 1898. At the sale on the 22d day of March, 1899, the property was bid in in the name of respondent for $2,102.82. At the time of the alleged foreclosure there was no default in the mortgage. Respondent had no notice or knowledge of the power of attorney or the attempted foreclosure until November 15, 1903. On March 22, 1901, Casper Ernst, or some person in his behalf, forged respondent's name to a deed purporting to convey said land to appellant John Carl. Respondent had no notice or knowledge of the existence of this forged deed until November, 1903. In November, 1903, respondent, being then in Minneapolis, arranged with McGowan & Mahoney, of Minneapolis, to look after his matters, including this mortgage, and through them he sent a letter to appellant John Carl, on November 21, 1903. Shortly after this letter was sent, Carl called at McGowan & Mahoney's office and had a conversation with McGowan, in which he said that he had come in response to that letter. McGowan told him they held the Baart mortgage, and that the interest would be payable at their office. Carl was there some time engaged in conversation with McGowan. He appeared nervous and worried over this mortgage. Carl applied to the Minnesota Title Insurance & Trust Company, and obtained a policy of title insurance on said lot for $2,500, dated December 5, 1903. On December 15, 1903, he made and verified his application in writing to have the title to the lot registered under the Torrens law. The application was filed in the office of the clerk of the district court of Hennepin county on January 23, 1904, and in the office of the register of deeds on January 25, 1904. On January 29, 1904, the application was referred to an examiner, who reported an unincumbered fee title in Carl. The respondent had no knowledge of registration proceedings. This action to foreclose said mortgage was commenced January 2, 1904, and the summons and complaint was served upon Carl and his wife on February 7, 1904. Carl took the summons and complaint so served upon him to the Minnesota Title Insurance & Trust Company on the 18th day of February, and made a claim on account of said policy of insurance. The company turned the summons and complaint over to its attorneys, and they prepared the answer to the complaint for Carl and wife. Respondent made his reply thereto, dated March 21, 1904. A notice of *lis pendens* in the foreclosure suit was filed in the office of the register of deeds on March 3, 1904. March 5, 1904, Carl elected to proceed with his registration proceedings, and the summons was issued in accordance with the examiner's report, and served and published. The respondent Baart, was not named, but the usual reference, was made to persons unknown. The proceedings for registration came before the court for

hearing on the 10th day of May, 1904. There was no defense, and on May 11, 1904, a decree was made and the title registered in John Carl as the owner in fee. On September 22d, thereafter, Carl deeded the land to the intervener, Deane. Carl's owner's duplicate certificate was surrendered and the lot was registered in the name of Deane.

The trial court found:

"(a) That as soon as said plaintiff received notice of said forged power of attorney and deed and said unauthorized foreclosure, he caused notice of the facts aforesaid to be given to said John Carl. And ever since the 1st day of December 1903, said John Carl has at all times had full notice and knowledge of the plaintiff's name and address and of all facts hereinbefore set forth, and that said plaintiff had and owned an unsatisfied first lien upon said premises under and by virtue of said mortgage, to secure said sum of $1,850, with interest thereon, together with the sum paid for insurance as hereinbefore set forth, and that neither said forged deed, nor any other paper or writing pertaining to said unauthorized foreclosure, was lawfully of record, and that eliminating such writings, therefore, unlawfully and wrongfully placed of record, said defendants Martin appeared of record to be, as they in fact were, the owners of the fee in said land, and that said plaintiff appeared also of record to be, and was in fact, the owner and the holder of a lien upon said land, unsatisfied and undischarged as hereinbefore stated and shown.

"(b) That immediately upon so receiving notice and knowledge of the facts aforesaid, said John Carl obtained from the Minnesota Title Insurance & Trust Company, a corporation doing business in the city of Minneapolis in said county, its policy or contract of insurance, wherein and whereby said company promised and agreed to pay to said John Carl the sum of $2,500, in case his title to said land should prove to be defective and he be ejected therefrom.

"(c) That thereupon said John Carl, with full notice and knowledge of all the facts aforesaid, sought to secure a registration of his title, under and pursuant to the provisions of chapter 237, p. 348, of the Laws of 1901, and acts amendatory thereof, and with intent to defraud said plaintiff of his said mortgage lien, sought to obtain such registration in such manner that no notice of the proceedings theretofore should be given to or received by said plaintiff until more than 60 days should elapse after the entry of the decree therein. And with such intent, and having such purpose in view, said John Carl, on January 23, 1904, made application to this court to have the title to said land registered, which application was made in writing, was signed and verified by oath of said John Carl as applicant, and was filed with the clerk of this court on the day last stated; a duplicate thereof being also, upon the same day, filed in the office of the register of deeds. That although when said John Carl, as such applicant, verified and filed such application, he was fully advised of all the facts above stated, he omitted to make any reference therein to plaintiff's said mortgage or to his lien upon said premises existing by reason thereof, and, on the contrary, falsely and corruptly averred in said application that he was the owner in fee of said premises; that no person except himself appeared of record to have any title, claim, estate, lien, or interest, in, to, or upon said premises; that the same were not subject to any lien or incumbrance; and that no person except himself had any estate or claimed any interest therein or thereto.

"(d) That thereupon said plaintiff, having no knowledge of the pendency of said registration proceedings, or any notice thereof, except such constructive notice, if any, as should be implied from the fact that a duplicate copy of said Carl's application therein was on file in the office of the said register of deeds, brought this action; the summons and complaint therein being personally served upon said defendants Carl early in the month of February, 1904, and being thereupon, and on the 18th day of said month delivered by Carl to his attorneys herein, who were and are also attorneys for the said Title Insurance & Trust Company. And on March 4, 1904, said plaintiff duly filed in the office of said register of deeds a notice of the pendency of this action.

"(e) That because of the false and corrupt statements of fact set forth in said application of said John Carl, hereinbefore mentioned, and not otherwise, the examiner of titles, by his report in said proceedings, made pursuant to section 17, of said chapter 237, p. 352, did not, as he would have otherwise done, make report that said applicant had no title proper for registration, but did, on the contrary, report that said Carl had title in fee to said premises, free and clear of any incumbrance whatsoever, and did not, as he would otherwise have done, make report that said plaintiff should be made a party defendant therein.

"(f) That on the 5th day of March, 1904, said John Carl caused to be filed in said registration proceedings an affidavit of his attorney therein, praying that a summons might issue in said matter, and caused it to be falsely stated and set forth in said affidavit that the only persons to be made defendants in said proceedings were Alzeoir O. Brusha and D. E. Pelo; and by reason of said false application of said John Carl and said affidavit obtained from this court an order directing its clerk to issue a summons in said proceedings which did not name the plaintiff as one of the defendants therein; and this, although the name and residence of said plaintiff, and his lien and claim of lien to said premises, were not at the time unknown, but were, on the contrary, well known, to said applicant, said John Carl.

"(g) That thereafter such proceedings were had in such registration proceedings that on the 10th day of May, 1904, the same came before this court upon the application of said John Carl for a final decree therein; and at such hearing then

had before said court, said John Carl was sworn, and testified, before said court, that there was no mortgage upon said premises, and that he did not know of any lien, claim, or mortgage, or anything against the same; which said testimony so given by said John Carl, as aforesaid, was false and untrue, and was known by him at the time so to be. And thereupon the court, induced by such testimony of said Carl, as well as by the report of the examiner in said proceedings, rendered its final decree therein, confirming the title of said John Carl to said premises and ordering registration of the same, adjudging him to be the owner in fee simple of said real estate, subject only to the rights and incumbrances specified in section 30 of said chapter 237, p. 357, and to the inchoate right of dower of his wife therein. And a certified copy of said decree was thereupon, and on the 11th day of May, 1904, filed in the office of the registrar of titles insaid county, and a certificate, and duplicate certificate of title made and executed in conformity therewith.

"(h) That the summons in said registration proceedings was never served upon the plaintiff herein as required by section 20 of said chapter 237, p. 353, or otherwise, nor did the clerk of said court mail a copy of said summons to said plaintiff as required by section 20-A of said chapter nor did his name appear in said decree of registration or in the application or summons, or examiner's report, or in any paper contained in or consituting any part of the files or records in said proceeding. That plaintiff did not appear in any way in said proceedings, or have any notice thereof, or of any of the steps taken therein, until October 5, 1904, when said plaintiff ascertained, and for the first time received notice of said pleadings from reading the complaint of said intervener herein; and the proposed supplemental answer of said defendant Carl, together with the affidavits thereto attached, which were served upon plaintiff's attorneys herein on the 23d day of September, 1904.

"(i) That on the 22d day of September, 1904, said John Carl and his said wife, executed and delivered to Clarence H. Deane, the intervener herein, a quitclaim deed of said premises; and thereupon, upon the presentation of said quitclaim deed in the registrar of titles, the said certificate of title theretofore made was canceled, the duplicate certificate theretofore issued to said John Carl was surrendered and canceled, and a new certificate of title to said intervener thereupon entered by said registrar, and a new duplicate certificate thereupon issued and delivered to him. That said defendants Carl received as consideration for said deed, the sum of $2,500 in cash, no part whereof was paid by said Deane. That said Deane received such title as was conveyed by said quitclaim deed, if any title was in fact conveyed thereby, for the use and benefit of the said Minnesota Title Insurance & Trust Company, by which the said sum of $2,500 was paid to said Carl. That said intervener, Clarence H. Deane, did not purchase from said defendants Carl said premises in good faith or for value. That at the time said quitclaim deed was so given and received, and said sum of $2,500 paid therefor, said intervener, and the said Minnesota Title Insurance & Trust Company, and each and both of them, had full notice and knowledge of all facts hereinbefore stated and found, and the sole motive and purpose of said intervener and the said company in procuring said quitclaim deed, and in the payment of said sum of $2,500, was to enable said Deane to intervene herein, and, together with the said defendants Carl, falsely assert the claim and alleged defense that said Deane was an innocent purchaser of said land, and thereby defraud said plaintiff out of his lien and claim under said mortgage.

"(j) That all sums of money which had been paid to the registrar of titles in said county, prior to the trial of this action, as provided in section 83, of said chapter 237, p. 373, of the Laws of 1901, did not exceed in the aggregate the sum of $475.

"(k) That the decree of registration hereinbefore mentioned was not at the trial of this cause offered in evidence by or on behalf of the defendants Carl, or either of them. That said decree was offered in evidence by said intervener alone, and was received in support of the allegations of his intervening complaint herein, and not otherwise. And no evidence was offered at said trial by said intervener, or received in his behalf, tending to show any taxes paid or improvements made upon said mortgaged premises."

A judgment and decree was ordered, annulling and canceling the power of attorney, the sheriff's certificate of sale, and all papers referred to therein, the warranty deed, the decree of registration, and all certificates of title entered or issued in pursuance thereof and so far as it in any wise impairs or affects the plaintiff's lien on the real estate under and by virtue of his mortgage and directing the foreclosure of the plaintiff's mortgage and the sale of the lot thereunder.

ELLIOTT, J.: The appellant Deane makes numerous assignments of error, and four of them are also assigned on behalf of the appellants Carl. The intervener questions the correctness of the conclusions of law, and especially of the findings of fact: (1) That Carl had notice of the rights of Baart before the summons in the foreclosure suit was served upon him; (2) that Baart had no notice of the registration proceedings; (3) that the Title Insurance & Trust Company and the intervener, Deane, had notice of the fraud by which the registration of the title was secured; and (4) that Deane was not a *bona fide* purchaser for value. We do not find it necessary to discuss these issues of fact, as we are convinced that there is ample evidence to support the findings.

1. The fact that Baart claimed a mortgage lien upon the land in question was known to Carl before he obtained title insurance, and before he filed the application for registration. It was

therefore necessary that Baart's name should appear in the summons. State v. Westfall, 85 Minn. 443, 89 N. W. Rep. 175, 89 Am. St. Rep. 571; Ware v. Easton, 46 Minn. 180, 48 N. W. Rep. 775. In order that the examiner may be able to know and report to the court who are necessary parties, the law contemplates and requires that the applicant shall in good faith give the information in his application which is required by section 3375 of Rev. Laws 1905. When the name of a claimant is known to an applicant, either from the report of the examiner, as in Dewey v. Kimball, 89 Minn. 454, 95 N. W. Rep. 317, 895, 96 N. W. Rep. 704, or from other sources, the summons cannot be served on such claimant by publication unless his name appears in the summons. As he is not an "unknown party" the concealment of his claim is a fraud on the court, and the decree therein entered is as to him of no force and effect.

2. It is contended by respondent that Carl could not obtain an indefeasible title under the Torrens law, because his claim rested upon a forged instrument which conferred no rights whatever upon him. This contention rests upon the theory that a person is entitled to register a title which he already has, and that registration alone cannot create a title. We think the purpose of the statute was to create an indefeasible title in the person adjudged to be the owner, and who thus becomes the original registered proprietor. In the absence of fraud, the decree is final, unless reversed or modified as authorized by the statute. The instruments produced at the hearing to establish the applicant's title are evidence upon which the court is required to act, and its conclusion as embodied in the decree, is conclusive. A subsequent registration obtained through the instrumentality of a forged deed would be governed by different considerations. As is well known, the Torrens system originated in South Australia, and has for years been in force in the states of the Australian confederation and in New Zealand. With various modifications, it has been adopted in Massachusetts, Illinois, California, Oregon, Minnesota, Colorado, Hawaii, the Philippine Islands, Ontario, and Manitoba. These statutes differ somewhat in their details, but the primary purpose of all is the creation of an indefeasible title in the registered owner, and the simplification of the transfer of land. There has been a difference of opinion as to the nature of the title which is subject to registration under these statutes. It was inferred from the case of Gibbs v. Messer (1891), App. Cas. 248, and held by numerous decisions, that the system is intended to confer an indefeasible title upon one only who deals with a person actually registered, and deals with him on the faith of the register. The full force of the argument in favor of this view appears in the following language quoted from Mere Roihi v. Assets Co. (1902), 21 N. Z. Rep. 715. This was a case where the land had been registered by mistake. The court said: "It is unconscientious and unjust that any person not being a purchaser for value and in good faith should retain an estate without right or title merely because he happened to be entered upon the register as owner of such estate. * * * The statute was not passed for the purpose of enabling such persons unjustly and unconscientiously to retain the estates of others, but for the purpose of simplifying the title to and the dealing with estates in land." But other courts accepted a broader view, and held that the system contemplates conferring a good title for all purposes on a person who, but for his certificate, would have no title at all. This view which, of course, does not include cases of fraud, is now established in the states and colonies subject to the appellate jurisdiction of the Privy Council. It was recently held in Assets Co. v. Mere Roihi (1905), App. Cas. 177, that the merely erroneous registration and certification of an invalid title affords no ground for impeaching the statutory title of an original proprietor. A title may thus be created by the decree and certificate of registration. In this case no distinction is made between an original proprietor and one who has been placed on the register in succession to another registered proprietor. This may be correct, possibly, where the subsequent change in the register is the result of a mere mistake; but a registered proprietor can never be deprived of his title through the instrumentality of forged instruments. Gibbs v. Messer (1891), App. Cas. 248.

3. But the important and controlling question in this case is: Can a decree of registration under the Minnesota Torrens law be attacked on the ground that it was obtained by fraud? The appellants rest their case squarely upon the words of the statute, and earnestly contend that the legislature intended to enact a law which, after the expiration of 60 days from the entry of the decree, would vest in the registered owner an absolutely indefeasible title, even though the registration was secured by the fraudulent practices of the person in whose name the land was registered. The Minnesota statute contains no express exceptionin favor of the owner of land which has been fraudulently registered in the name of some other person. The argument is that the importance of making the title absolutely indefeasible after the expiration of the period of limitation induced the legislature to depart from the ordinary rule, and permit a party who has been guilty of fraud to retain the benefits thereof, saving only for the defrauded landowner his right of action against the party guilty of the fraud, and a claim against the insurance fund provided for by the statute. The present case well illustrates the utter inadequacy of such remedy. The legislature never consciously provided a method by which such an unconscionable scheme might be successfully consummated.

(a) An examination of the Torrens laws of the different states and colonies discloses the fact that those of Minnesota and the Fiji Islands only

contain no express exception of cases of fraud. All the original Torrens statutes carefully guard against the possibility of an owner being fraudulently deprived of his property. That this important feature is sometimes overlooked is illustrated by a recent book on "Registering Titles to Land" by Jacques Dumas. It is there asserted that security and protection are in all cases obtained by combining two principles: (a) That registration can never be subject to rectification; and (b) that where a mistake has been made, the person suffering the injury is entitled to compensation out of the public funds according to the fact of liability. "There is an exception to the first of these principles," says the author, "in all other countries than Australia, when it is proved that registration has been obtained by fraud or error. But this exception does not weaken in the least the warranty afforded by the registration since it has no effect on a *bona fide* purchaser for value." Elsewhere, in speaking of certain European systems, the writer says: "Another difference from the Australian system is that * * * whenever registration has been obtained by fraud, error, or compulsion, or when one of the parties is incapacitated, rectification can be obtained. This is subject to the rights of third parties when acquired for value and in good faith in reliance on the correctness of the register." As a matter of fact, all the Australian statutes provide that registration obtained by fraud is invalid, except as against *bona fide* purchasers for value upon the faith of the register. Under certain sections of the parent acts, a certificate of title is declared to be conclusive evidence of the proprietor's title to the land, but other sections which are to be read as provisos introduce exceptions to this conclusiveness. Marsten v. McAlister, 8 N. S. W. 300. A certificate of title, therefore, though properly registered and authenticated, is onlyconclusive until it is shown to fall within one ofthe recognized exceptions. Wadham v. Buttle, 13 S. A. Rep. 1; Main v. Robertson, 7 A. L. T.(V.) 127. In Hogg's Australian Torrens System, p. 823, it is said: "Apart from any question of the special rights of the crown there seems to be three clases of cases in which the certificate of title will not be conclusive: (1) Where a certificate of title of earlier date is in existence; (2) where the land has been made the subject (wholly or partially) of a certificate of title by mistake; and (3) where the certificate of title has been obtainad by fraud." The South Australian statute (Act No. 380, 1886, § 69) provides that: "The title of every registered proprietor shall, * * * be absolute and indefeasible, subject only to the following qualifications: (1) In case of fraud, in which case every person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act. Provided that nothing included in this subsection shall affect the title of a registered proprietor, who has taken *bona fide* for valuable consideration, or of any person *bona fide* claiming through or under him." In New Zealand (Act 1885, §§ 55, 56, 182), it is provided that: "No action for possession or other action for the recovery of any land shall lie or be sustained against the registered proprietor under the provisions of the act for the estate or interest in respect to which he is so registered except in any of the following cases, that is to say * * * (3) The case of a person deprived of land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee *bona fide* for value from or through a person so registered through fraud. In all other cases the register is conclusive; any rule of law or equity to the contrary notwithstanding." This provision is also in the Tasmania statute (25 Vic. No. 16, 1862), which also provides that the holder of a registered title is entitled, except in cases of fraud, to hold the land subject to the liens excepted by the statute, and gives a right of action for damages against the party guilty of the fraud. Practically the same provisions as are found in Queensland Act 1861, §§ 44, 123, 126; Western Australia Act, 56 Vic. No. 14, 1893, §§ 68, 199, 201; New South Wales Act, No. 25, 1900, §§ 42, 43, 124, 126; Vicaria Act 1890, No. 1149, §§ 74, 205, 207. The Manitoba real property act, 1 & 2 Edw. VII, ch. 43, § 71 (Rev. St. Manitoba 1902, vol. 2, ch. 148), makes the certificate conclusive evidence that the person named therein is the owner of the land, subject to the statutory exceptions and the right to show fraud wherein the registered owner, mortgagee, or incumbrancer has participated or colluded. The act also provides that: "Nothing contained in this act shall take away or affect the jurisdiction of any competent court on the ground of actual fraud, or over contracts for the sale or other disposition of land, or other equitable interests therein." Jones, Torrens System, p. 337. The Ontario act 1885 provides that a person who fraudulently procures an entry in the registry is guilty of a felony and "any certificate of title obtained by means of such fraud or falsehood shall be null and void for or against all persons other than a purchaser for valuable consideration without notice." Jones, Torrens System, pp. 143, 144. The Massachusetts statute (Rev. Laws Mass. 1902, ch. 128, § 37) makes the decree of registration conclusive, "subject, however, to the right of any person deprived of the land or of any estate or interest therein by a decree of registration of land by fraud, to file a petition for review within one year after the entry of the decree, provided no innocent purchaser for value has acquired an interest." This provision also appears in the Hawaiian statute (Rev. Laws 1905, ch. 154, § 2431), and in substance in the Philippine Act (volume 8, Acts Philippine Com. No. 496, § 38). In Illinois (Act May 1, 1897 [Laws 1897, p. 141]; Starr & C. Ann. St. Supp. 1902, p. 266, ch. 30, par. 48) and Oregon (Gen. Laws 1901, p. 438; volume 2, B. & C. Comp. ch. 101, § 5432), the registered owner shall, "except in cases of fraud to which he is a party or of the person

through whom he claims without valuable consideration paid in good faith," held the land subject only to such estates as are noted or reserved by the statutes. In California (Gen. Laws 1903, p. 139, Act 4115, § 37), it is provided that "in case of fraud any person defrauded shall have all rights and remedies that he would have had if the land were not under the provisions of this act, provided that nothing contained in this section shall affect the title of a registered owner who has taken *bona fide*, for a valuable consideration or of any person *bona fide* claiming through or under him." The Colorado statute (Laws 1893, p. 298, ch. 107; 3 Mills' Ann. St. Rep. Supp., ch. 29) is based on the Minnesota statute, and contains no exception of fraud. For the construction of the provisions relating to fraud in the Australian and New Zealand acts, see Assets Co. v. Mere Roihi (1905), A. C. 177, and numerous cases cited in the Australian Torrens Digest (1893); Hunters Torrens Title Cases, vol. 1; Hogg's Australian Torrens System, p. 833 *et seq.*

(b) These provision are omitted from the Minnesota statute. It declares that every person securing a title in pursuance of a decree of registration and every subsequent purchaser of registered land who takes a certificate of title for value and in good faith shall hold the same free from all incumbrances except only such estate, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office and except (1) lien claims on rights arising or existing under the laws of the constitution of the United states which the statutes of this state cannot require to appear in the record of the registry; (2) any tax or special assessment for which a sale of the land has not been had at the date of the certificate of title; (3) any lease for a period not exceeding three years when there is actual occupation of the premises under the lease; (4) all public highways embraced in the description of the lands included in the certificates shall be deemed to be excluded from the certificates; (5) such right of appeal or right to appeal and contest the application as is allowed by the act. The act gives a right of appeal to the supreme court within the time and upon the conditions provided for appeals in civil actions and provides that the decree may within 60 days after it is entered be opened upon the petition of an interested party who had no actual notice of the proceedings. Rev. Laws 1905, § 3394, requires this petition to be filed within 60 days; although the time within which the decree may be set aside and the original certificate of registration declared invalid is, by section 3396, extended to six months. It also provides that any person interested may petition for the correction of omissions or mistakes but "that this section shall not give the court authority to open the original decree of registration." There is no express provision for vacating a decree obtained by fraud even as against the original wrongdoer and before the rights of innocent parties have attached. It is provided that when an innocent purchaser has acquired rights within the 60 days, the decree shall not be opened, but the "person aggrieved by such decree in any case may pursue his remedy by action of tort against the applicant or any other person for fraud for procuring the decree." The only other references to fraud are found in the provisions that a person who fraudulently procures the registration of a title is guilty of felony and that an action may be brought against the county treasurer for the recovery of damages out of the insurance fund.

4. If the legislature intended to protect a party, who, by fraudulent means, obtains the registration of some other person's land in his name, it should have said so clearly and definitely, and left nothing to implication. It must be presumed that the legislature understood and expected that the courts of equity would remain open to parties who were able to bring themselves within the rules which require the granting of equitable relief. The fact that a statute does not expressly provide that fraud shall invalidate acts authorized to be done under it does not deprive the courts of the general power to protect the rights of parties. The principles which are recognized, and enforced in courts of equity underlie our entire system of jurisprudence. They are no more excluded by the failure to insert an exception in the statute than by a failure of parties to insert a similar exception in a private contract. Equity will not allow a party to hold the benefits of a fraudulent transaction although obtained under the forms of law. It is the just and proper pride of our system of equity jurisprudence that fraud vitiates every transaction. However, men may surround it by forms, solemn instruments, proceedings conforming to all the details required by the law, or even by the formal judgment of a court, a court of equity will disregard them all if necessary that justice and equity may prevail. It has often been held that the general terms of a statute are subject to implied exceptions founded in the rules of public policy and the maxims of natural justice, so as to avoid absurd and unjust consequences. Hantzch v. Massolt, 61 Minn. 361, 63 N. W. Rep. 1069; State v. Board, 67 Minn. 352, 69 N. W. Rep. 1083; Duckstadt v. Board, 69 Minn. 202, 71 N. W. Rep. 933; State v. Rollins, 80 Minn. 216, 83 N. W. Rep. 141; State v. Barge, 82 Minn. 256, 84 N. W. Rep. 911; State v. City Council, 87 Minn. 156, 91 N. W. Rep. 298; U. S. v. Williams, 194 U. S. 279, 24 Sup. Ct. Rep. 791, 48 L. Ed. 979. For English authorities in which the courts have raised implications when necessary to prevent injustice, see articles in 20 Law Quar. Rev. 399, and 22 Law Quar. Rev. 299. The rule which authorizes an exception or an evident omission to be read into a statute was applied by this court in State v. Board of County Comm., 87 Minn. 325, 92 N. W. Rep. 216, where it was held that the omission from a statute of a provision, the absence of which would render the statute unconstitutional would be presumed un-

intentional. "We are not," said the court, "authorized to indulge in the presumption that the legislature willfully intended to depart from the settled law of the land." Hence when necessary to prevent a fraud, a court of equity will read an exception into a statute which is expressed in general terms. By statute 7 Ann. Ch. 20, all unregistered conveyances of land were declared fraudulent and void as against subsequent purchasers for a valuable consideration. The statute did not except purchasers with full knowledge, and the courts of law held that a subsequent deed was void, although the party claiming under it had full knowledge when it was executed of the existence of the prior deed. Doe v. Allsop, 5 Barn. & Ald. 142. But the courts of equity, in order "to maintain and extend a righteous and beneficent jurisdiction," ingrafted an exception into the act of Parliament. In the language of Lord Mansfield, "Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside because he has that notice which the act of Parliament intended he should have." Doe v. Routledge, Cowp. 712. The principle is applied in a line of English cases beginning with LeNeve v. LeNeve, Amb. 436, 1 Ves. Sr. 64, 2 White & Tudor L. C. Eq. 109, decided under registration acts which contained no exception of fraud or a provision in favor of *bona fide* purchasers only. We cannot presume that the legislature in enacting a law, which was intended to benefit the public, and at the same time fully and adequately protect and guard the rights of individuals, intended, by failing to insert an exception in cases of fraud, to deprive the courts of the universally recognized and established jurisdiction to protect the individual from the consequencee of fraud. What we have said applies only so long as the land remains registered in the name of the fraudulent wrongdoer. When the rights of an innocent purchaser for value in reliance on the register are involved, other considerations prevail. In the case at bar, the court has found that the registration was obtained by actual fraud, and that the intervener, Deane, was a party to the fraudulent transaction under conditions which supply the moral element which distinguishes actual from so-called legal fraud. We are, therefore, not required to determine whether mere notice of the rights of others constitutes fraud under this statute.

5. An application to vacate the decree, directing the registration of land and the cancellation of the certificate of registration issued thereunder, on the ground that it was obtained by the fraud of the applicant for registration, is governed by general equitable considerations. The Torrens statute makes the provisions of the general statutes relating to the vacating and opening of ordinary judgments, inapplicable. A person who seeks equitable relief must, therefore, proceed promptly after notice of the fraud, and is, of course, subject to all the restrictions and exceptions applicable in proceedings in equity. The 60-day limitation contained in the statute when these transactions occurred (now made six months by Rev. Laws 1905, § 3396) has no application to the case at bar. If the defrauded party is not guilty of laches, he may attack the decree on the ground that it was obtained by fraud, so long as the land stands registered in the name of the party who was guilty of the fraud. No public policy requires that such a title be indefeasible, or that so tempting a reward be offered for the stealing of land under the forms of law. We have given all the assignments of error careful consideration, but do not find it necessary to discuss them in detail.

The order of the trial court is affirmed on both appeals.

NOTE.—*The Power and Right of Courts of Equity to Set Aside Judgments Procured by Fraud as Applicable to Titles Vesting Under the Torrens System of Land Registration.*—The decision in the principal case is certainly one that accords with sound, judicial principles. While it is no doubt the purpose, at least it is so recognized by the registration act which has been introduced in some of the states in this union, known as the Torrens system, that when land is once so registered, that the title thereafter shall be indefeasible and cannot be attacked at least in collateral proceedings. But it certainly would be contrary to justice and sound public policy to allow a title that was put within the protection of such an act by means of fraud to be held good against the parties defrauded, at least when the property has not passed into the hands of the innocent purchaser, and there is no doubt of the soundness of the decision in the principal case in following the old and well-known rule that fraud vitiates everything, and that a court of equity will in such cases, no matter even if rights have been adjudicated and passed into judgment, give relief to the parties who have been defrauded While it is a general rule that judgments and decrees of court cannot be attacked in a collateral proceeding, yet where all the parties are before the court, and it is shown that the decree or judgment was acquired by the fraudulent acts of some of the parties in court, relief will always be granted.

It is not very clear from the decision in the principal case, whether the parties intended to defraud the original holder of his title, and lien on the premises, or whether it was the purpose of the parties to have their title placed under the protection of the registration act and then compel a lien holder to get his remedy from the fund which is usually set aside under the Torrens Act to protect persons and titles that may in some manner have become defective or their owners been deprived of their legal rights. The "Torrens system" has not become very prevalent in the United States. So far as I have been able to learn, the system has been adopted only in Minnesota in 1901, California, in 1897, Oregon in 1901, Coloradoand Hawaii in 1903, Massachusetts in 1898, and Illinois in 1897. An act of that character was passed in Ohio, in 1896, but was declared unconstitutional. State v. Gilbert, 56 Ohio St. 575, 60 Am. St. Rep. 756. And the system has been adopted in the Philippines and possibly some other states, but it is of such a recent date that no decisions have as yet reached the supreme court.

In the case of Owsley v. Johnson (Minn. 1905), reported in 103 N. W. Rep., it is said in the syllabus that all rules and principles of law applicable to rights in

real property and rules of practice, with reference to the trial of actions at law, or in equity in so far as clearly not inappropriate, or otherwise provided for should be applied in the proceedings under the Torrens Act for land transferred, and where issue is joined in such proceedings, findings of fact and conclusions of law should be made as in ordinary actions. And in Gloss v. Cessna (1904), reported in 207 Ill. 169, it is said that abstracts of titles or books of abstracts are not admissible in evidence in a proceeding for initial registration of title unless a proper foundation has been laid as in other cases. An applicant for original registration in fee simple must make such proof as to warrant such registration of such title as against the world and not merely such title as would be sufficient to authorize a decree for removing cloud. And in Dewey v. Kimball, 89 Minn. 454, it is held that when proceeding under the Torrens Act, the applicant cannot in taking the steps provided for in the act, ignore and disregard the report and advice of the examiner as to what parties or persons should be made defendants. This is somewhat in line with the principal case where the applicant did not make a person defendant whom he knew should not have been so made. The case of People v. Simon, 176 Ill. 165, contains a very thorough examination and discussion of the act of that state in which the statute is held to be constitutional. In this decision the court considers the Ohio case and say, that they agree that the Ohio statute was unconstitutional but say that the decision there announced is not applicable to the Illinois act.

The constitutionality of the Massachusetts act was decided in the case of Tyler v. The Judges (1900), 175 Mass. 71, where it was decided that the act was not unconstitutional in that the original registration deprives all persons except the registered owner of any part of the land, without due process of law in that it gives judicial powers to the recorder and the assistant recorders after the original registration, etc. The opinion was rendered by Chief Justice Holmes, now a member of the United States Supreme Court. Two very able dissenting opinions are rendered in which a large number of cases upon the propositions involved are reviewed.

The Torrens system of land registration has received very full attention in 54 Cent. L. J. 282, where there is an article on the subject by a then editor, and on p. 285 there is another very complete article disciosing the act quite fully by a Boston lawyer. This latter article gives particular attention to the Massachusetts act as well as a copy of the original certificate of title and on page 290 is given the decision of the Supreme Court of Minnesota, deciding the act constitutional, and on page 293 is a very extended note disclosing the constitutionality of the system, and on page 461 there is a short editorial on the matter.

WM. M. ROCKEL.

Springfield, Ohio.

JETSAM AND FLOTSAM.

LEGAL EFFECT OF ULTRA VIRES CONTRACTS.

It follows logically from the original theory of the nature of corporate entity, that *ultra vires* acts are non-corporate acts and mere nullities as far as the corporation is concerned. Chewalca Lime Wks. v. Desmukes F. & Co. (1888), 87 Ala. 344; Straus v. Eagle Ins. Co. (1855), 5 Ohio St. 50. There is, however, a strong line of cases in which the courts, upon one theory or another, have enforced the rights and liabilities of a corporation on contracts outside the scope of its authorized powers. Ayers v. Banking Co. (1871), L. R. 3 P. C. App. 548; Des Moines Gas Co. v. West (1878), 50 Iowa, 16; Citizens' Bk. v. Hawkins (1896), 71 Fed. Rep. 369. But if *ultra vires* acts are to be dealt with as corporate acts, the question at once arises why the corporation is not bound by them generally as by acts *intra vires*. The courts have proposed an answer in the express or implied limitations of corporate powers which have been regarded as making acts unlawful, which otherwise would be within the corporate capacity. Thompson, Corp. § 5972, and cases cited. Although violations of express prohibitions are *prima facie* illegal (Morawetz, Corp. § 657), it is open to question whether an act merely in excess of an implied restriction can in any proper sense be treated as an illegal act subject to the rules governing illegal contracts in general. Bissell v. Railway Co. (1860), 22 N. Y. 258, 269; Attorney General v. Railway Co. (1879), L. R. 11 Ch. D. 449, 502. But the courts often seem to have made little or no distinction between prohibited and unauthorized exercise of powers (Cf. Wright v. Pipe Line Co. (1882), 101 Pa. St. 204, and Case v. Kelly (1890), 133 U. S. 21; Bath Gas Light Co. v. Claffy (1896), 151 N. Y. 24, and N. Y. R. S. ch. 35, § 10), endeavoring indiscriminately to determine rights and liabilities arising thereon according to the principles governing illegal contracts. Case v. Kelly, *supra*; People v. Chicago Gas Co. (1889), 130 Ill. 268.

Although the adoption of the illegality doctrine necessarily involves the admission of capacity in the corporation, the cases not infrequently so confuse the two as to make it difficult to assign the proper ground. See Dunbar v. Telegraph Co. (Ill. 1906), 78 N. E. Rep. 423. Yet when title to firm property is involved, the question becomes important, since it can be held to pass if the contract is merely illegal (Tritts v. Palmer (1889), 132 U. S. 282; Lancaster v. Am. Imp. Co. (1894), 140 N. Y. 576), but not if the act was not a corporate act at all. Lafferty v. Evans (Okl. 1906), 87 Pac. Rep. 304. Furthermore, results are frequently reached which principles of illegal contracts will not support. For instance, in many cases no distinction is made between the corporation and the other contracting party in allowing a recovery where the contract has been fully performed on one side and the other is in default, although the corporation is obviously the more guilty party. Whitney Arms Co. v. Barlow (1875), 63 N. Y. 62; Morawetz, Corp., § 693, and cases cited. Again, recovery has been allowed upon the contract where one party has performed, although strictly the only recovery under illegality theories should be *quasi* contractual. Bath Gas Co. v. Claffy, *supra*; Wright v. Pipe Line Co., *supra*; Camden Ry. Co. v. Mays Landing Ry. Co. (1886), 48 N. J. L. 530. And actions in disaffirmance of the contract, to recover what has been parted with before default by the other party and before full performance by either have been denied, a result incompatible with the principle of *locus pœnitentiæ*, even though both parties were *in pari delicto*. St. Louis Ry. Co. v. Terre Haute Ry. Co. (1891), 145 U. S. 393. Thus the conception of an *ultra vires* contract as an illegal contract is found to be inconsistent with the law as applied.

Moreover it is neither warranted nor necessary to give full effect to the restrictions upon authorized corporate activity. Bissell v. Railway Co. (1860), 22 N.

Y. 258, 271. For wherever the theory of corporate capacity to act outside of the scope of its authorized power is recognized, the true doctrine would seem to be that the constating instruments prescribe as between the state and the corporation the conditions upon which the corporate franchise may be exercised, and as between the stockholders and the corporation the limits of the authorized activity. If, then, all of the stockholders joined in the unauthorized act, the consequences as regards the corporation and third parties would be as though the act were authorized. Des Moines Gas Co. v. West, *supra;* Bath Gas Co. v. Claffy, *supra*; Martin v. Niagara Falls Co. (1890), 122 N. Y. 165. But if all of the stockholders did not assent to this unauthorized act then it is clear that any dissenting stockholder could restrain the *ultra vires* act. Coleman v. Eastern Co. Ry. (1846), 10 Beavan, 1; cf. Keane v. Johnson (1853), 9 N. J. Eq. 401; Angell and Ames, Corp. § 393. It would also appear by analogy to the relation between trustee and *cestui que* trust that the corporation as a *quasi* trustee of the stockholders would be allowed to defend an action brought upon an unauthorized contract upon the ground that not all of the stockholders had assented. Lucas v. White Line Transfer Co. (1886), 70 Iowa, 541; People v. Ballard (1892), 134 N. Y. 239. Thus, once corporate capacity to act is admitted in an *ultra vires* transaction, this doctrine presents the only solution which will satisfy the interests of all parties concerned. Of course in these cases the corporation subjects itself to the liability of forfeiting its corporate franchise at the instance of the state, although the better authorities recently show a tendency to restrict forfeiture to cases involving the public interest. Cf. Atty. Gen. v. Great Eastern Ry. Co., *supra*; 11 Harvard Law Review, 387.—*Columbia Law Review.*

RIGHTS OF DEPOSITOR UPON SUB-DEPOSIT MADE BY DEPOSITARY BANK.

The claim of a bank against a second bank in which it has made a deposit of money is ordinarily an asset attainable by any creditor of the first bank; but in at least two instances it is believed that, upon an application of the general rules of the law of trusts, the facts will be found to show that the first bank holds its claim against the second in trust for a particular depositor of the first bank. The first case arises where a sum of money is deposited in a bank to be forwarded to a correspondent bank, in order that the latter may meet at maturity an obligation of the depositor payable in the locality of the correspondent bank. Here the depositary bank, after forwarding the money, has against its correspondent bank, until the latter has met the obligation, a claim or credit running to it which, it is submitted, the first bank holds in trust for its client; for the first bank has no beneficial interest in the claim, but has created it solely for the sake of the depositor. Accordingly, the failure of the depositary bank at this stage of the transaction would find the depositor a secured creditor to the extent of this claim of which the bank had become trustee for him. Farley v. Turner, 26 L. J. Ch. 710; St. Louis v. Johnson, 5 Dill. (U. S.) 241. This result is but just, as a contrary rule would leave the depositor exposed to the double hazard of loss by the failure of either the depositary or the correspondent bank.

The second instance arises where the depositary bank makes a deposit with a second bank out of the funds received from a particular depositor, upon the understanding that the first bank is to draw upon the second only when the original depositor draws upon the first bank, and only for the second bank's proportionate share of such drafts. Here, by its agreement, the first bank has no right to use its claim against the second bank as general assets to meet any debt, but is confined to an application of the claim for the benefit of the original depositor. It will be noted that this case, though it arises in a different manner from the first, is similar to the first case in all respects except that here the sub-deposit is made, not, as above, at the request of the orignal depositor, but upon the motion of the depositary bank without any request by its client, and even, it may be, without his knowledge. But as notice to the *cestui* of a declaration of a trust is not necessary to its validity (Martin v. Funk, 75 N. Y. 134), this difference is immaterial. In neither case is any element of a complete trust lacking. The legal title is in the bank, the beneficial interest in the depositor. That the parties did not call the transaction a trust is not fatal, for no form of words is necessary to the creation of a trust. Ames Cas. on Trusts, 2d. Ed., 97, n. 2. It is true that in both cases the depositary bank would doubtless have the right, as against the depositor, to revoke the transaction with the second bank; but this is not inconsistent with the existence of a trust. Although, if the power of revocation is not reserved expressly or impliedly, a trust is irrevocable, yet there is no doubt that a trust may be revocable by its terms. Perry on Trusts, 5th Ed., § 104. Accordingly, it has been held that in the second case, also, upon the failure of the first bank the depositor is entitled as *cestui* to receive in full the proceeds of the first bank's claim against the second, in preference to the general creditors. Marquette v. Wilkinson, 119 Mich. 413.

A recent federal decision presents the same facts as in the second case, and attains the same rusults, but bases its conclusion upon the existence of an illegal agreement between the two banks to refrain from real competition in bidding for the original deposit and to divide it up secretly. *In re* Salmon (U. S. D. C., W. D. Mo.), 145 Fed. Rep. 649. The reasoning of this decision based, as it is, upon the right of the depositor to follow property obtained from him illegally, is not inconsistent, however, with that already set forth, for each theory presents a distinct and adequate basis for recovery. But the suggested theory of express trust is not restricted in its scope to cases of illegality.—*Harvard Law Review.*

NEWS ITEM.

INTERFERENCE OF EXECUTIVE IN ATTEMPTING TO OBTAIN A FAVORABLE CONSTRUCTION OF THE EMPLOYERS' LIABILITY ACT.

The attorney-general of the United States, evidently at the president's dictation, is seeking to become a party to the litigation now pending in the federal court, involving the constitutionality of the Federal Employers' Liability Act. After a severe rebuke in the federal district court for the western district of Kentucky when he attempted to intervene, by petition as *amicus curiæ* in the case of Brooks v. Southern Pacific Ry. Co., 64 Cent. L. J. 52, the attorney-general, nothing daunted, has made similar request to the Supreme Court of the United States, which has been granted, to act as *amicus curiæ* in the case of Howard v. Illinois Central Railway Co., the first case to reach the highest tribunal involving this important question as to the construction of this important legislation.

On motion of the attorney-general this case was advanced on the calendar and set for argument on April 8, 1907.

We are not so certain that it is the part of wisdom on the part of the president thus to throw his large personal influence into the scales, intending thereby to affect favorably or unfavorably the action of federal courts in any particular case pending before it. There will always be a suspicion in such cases that federal judges acting favorably on the contention of the president through his attorney-general, have done so to avoid the political consequences that might result otherwise. The fact, however, that the two district courts which have already passed upon this question, one in Tennessee and one in Kentucky, reached conclusions absolutely contrary to the expressed wishes of the president, is gratifying evidence of the freedom of our federal judiciary from such influences.

We were pained, nevertheless, to learn from the press reports that the president has thought wise to express his disappointment at the decision of Judge Evans in the Brooks' case and that he even went so far as to assail the judicial competency of that learned jurist in reaching that particular decision. We are certain that every lawyer, irrespective of party affiliations, has resented most heartily this interference of the executive with the independent discretion of the federal judiciary. It is only one trained in a knowledge of the delicate checks and balances of our governmental machinery, who can appreciate how serious are the complications that may arise from the interference of one department of the government with another department of equal dignity. Moreover, an interference of this character is quite opposed to the ethics of official relationship. It would show the same absence of a proper sense of propriety for the chief justice to instruct the president how to build the Panama Canal, as for the president to tell the federal judiciary how to construe the Federal Employers' Liability Act, especially where the latter goes so far as to assail members of the federal court who fail to effectuate his wishes in the matter.

BOOK REVIEWS.

SUPPLEMENT TO SNYDER'S INTERSTATE COMMERCE ACT AND FEDERAL ANTI-TRUST LAWS.

We have at hand the supplement to Snyder's Interstate Commerce Act and Federal Trust Laws, embracing the Railway Rate bill, approved June 29, 1906, amending the commerce act and Elkin's act with introduction and full notes of judicial decisions rendered since the publication of the work of July, 1904, with a reference to the anti-trust laws of the several states, including also the Employers' Liability bill, Pure Food bill, Meat Inspection bill and Hall Mark of Jewelers' Liability bill, containing also index and table of cases. By William L. Snyder of the New York bar.

This supplement is valuable for the decisions it contains which are ably discussed by the author and brings the laws of this most important subject up to date. The value of such a work need not be commented upon at this time to impress its importance.

It contains 108 pages, well bound in buckram, and published by Baker, Voorhis & Co., New York.

BOOKS RECEIVED.

Military Law and the Procedure of Courts-Martial. By Edgar S. Dudley, LL.B., LL.D. Colonel, Judge-Advocate, U. S. Army. Professor of Law at the United States Military Academy, West Point, New York. First Edition. New York. John Wiley & Sons. 1907. Cloth. Price, $2.50. Review will follow.

HUMOR OF THE LAW.

Frank O. Lowden, the lawyer of Chicago, who made such a fight for the republican nomination for governor of Illinois, a year ago, was elected to a Greek letter fraternity when he first went to college, and made treasurer of the chapter.

At the end of his first term as treasurer there was a deficit of $247, which Lowden paid.

"We want you to be treasurer again, Frank," the members of his fraternity said to him at the beginning of the sophomore year.

Lowden considered the proposition with a good deal of care.

"All right," he answered finally. "I will serve again as treasurer if the society will give a bond to me."

The blow that destroys the effect of an adverse examination is occasionally more the result of accident than of conscious effort. In a trial not long ago a very simple witness was in the box, and after going through his ordeal was ready to retire. One question remained:

"Now, Mr. ——, has not an attempt been made to induce you to tell the court a different story?"

"A different story to what I have told, sir?"

"Yes. Is it not so?"

"Yes, sir."

"Upon your oath, I demand to know who the persons are who have attempted this."

"Well, sir, you've tried as hard any of 'em," was the unexpected answer. It ended the examination.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ANIMALS—Injuries From Animals Running at Large.—The owner of a steer who has knowledge of its dangerous character is liable for injuries inflicted by the steer while running at large, irrespective of whether the owner was negligent in securing the steer.—Harris v. Carstens Packing Co., Wash., 86 Pac. Rep. 1125.

2. APPEAL AND ERROR—Evidence.—Where the verdict is the only one which could be sustained under the evidence, errors assigned in giving or refusing instructions will not be considered.—Morrow v. Laverty, Neb., 109 N. W. Rep. 150.

3. APPEAL AND ERROR—Jurisdiction of Lower Court.—A defendant in equity filing cross-bill held not entitled to urge the dismissal of the original bill for want of jurisdiction in the trial court.—Champion v. Grand Rapids, G. H. & M. Ry. Co., Mich., 108 N. W. Rep. 1078.

4. APPEAL AND ERROR—Mortgage.—A mortgagee held not entitled to raise for the first time on appeal question that a purchaser of the premises who assumed the payment of the debt had no sufficient interest in the land as to entitle him to a satisfaction of the mortgage.—Griffin v. Erskine, Iowa, 109 N. W. Rep. 13.

5 APPEAL AND ERROR—Pleading.—Defendant having had the benefit of all matters of defense pleaded in a plea to which a demurrer was sustained under the general issue held not prejudiced by the sustaining of the demurrer.—C. H Gilliland & Son v. Martin, Ala., 42 So. Rep. 7.

6. ATTORNEY AND CLIENT—Disbarment Proceedings.—Where, in disbarment proceedings, defendant was acquitted there was no ground for extending the testimony and preserving it.—State v. Tomlinson, Iowa, 109 N. W. Rep. 120.

7. BANKRUPTCY — Federal Courts.—Where, prior to bankruptcy proceedings, property had been conveyed by the bankrupt to a trustee for the benefit of creditors, the bankruptcy court did not acquire exclusive jurisdiction so as to preclude an adverse claimant from maintaining replevin in the state court.—Morning Telegraph Pub. Co. v. S. B. Hutchinson Co., Mich., 109 N. W. Rep. 42.

8. BANKS AND BANKING—Action on Certified Check.—In an action against the receiver of an insolvent bank on a check fraudulently certified by it, the burden was on plaintiff to show that he was a *bona fide* purchaser.—Detroit Nat. Bank v. Union Trust Co., Mich., 108 N. W. Rep. 1092.

9. BANKS AND BANKING—Excessive Loans.—Where a loaning bank accepts from the borrowing bank a note signed by the latter's cashier personally and indorsed by the borrowing bank, the borrowing bank is not thereby relieved from its obligation as a debtor —First Nat. Bank v. State Bank of Northwood, N. Dak., 109 N. W. Rep. 61.

10. BANKS AND BANKING — Local Customs.—A bank held bound by the acts of its cashier in the ordinary course of his employment which were not *ultra vires*.—Sherwood v. Home Sav. Bank, Iowa, 109 N. W. Rep. 9.

11. BENEFIT SOCIETIES—Conditions of Membership.—Unauthorized delivery of certificate to member by subordinate officer before initiation held not a waiver of such conditions of membership —Driscoll v. Modern Brotherhood of America, Neb., 109 N. W. Rep. 158.

12. BILLS AND NOTES—Indorsee.—To defeat a recovery on a note in the hands of an indorsee before maturity and for a valuable consideration it must be shown that the indorsee took the paper under circumstances showing bad faith or want of honesty.—Norwood v. Bank of Commerce, Neb., 109 N. W. Rep. 152

13. BILLS AND NOTES—Liability of Indorser.—To hold an indorser on a note, the note must be presented and demand must be made on the maker and notice of its dishonor must be given to the indorser, unless waived.—Galbraith v. Shepard, Wash., 86 Pac. Rep. 1113.

14. BOUNDARIES—Location by Parties.—Act of vendor in pointing out a wrong boundary, it not being in dispute, held not to affect its location as against third person, in absence of adverse possession for period of limitations.—Turner v. Angus, Mich., 108 N. W. Rep. 1100.

15. CARRIERS—Injury to Passengers.—A railway company admitting a passenger into a caboose incurs the same liability for his safety as though he had taken passage on a regular passenger train.—Southern Ry. Co. v. Burgess, Ala., 42 So. Rep. 35.

16. CARRIERS—Passengers.—In an action by a passenger against a street railway company the burden of proof held to remain with plaintiff to prove that the injury was received substantially as alleged.—Lincoln Traction Co. v. Brookover, Neb., 109 N. W. Rep. 168.

17. CHATTEL MORTGAGES — Possession.—The power contained in a chattel mortgage authorizing the mortgagee to take possession of the property does not authorize him to do so if it is necessary to exercise force or the slightest assault or other breach of the peace.—C. H. Gilliland & Son v. Martin, Ala., 42 So. Rep. 7.

18. CONSPIRACY—Indictment.—An indictment for conspiracy must show that the object of the conspiracy was criminal, or if not, that the means employed to accomplish the object were criminal.—State v. Eno, Iowa, 109 N. W. Rep. 119.

19. CONSTITUTIONAL LAW—Due Process of Law.—Ballinger's Ann. Codes & St. § 6018, imposing a penalty for a failure to comply with section 6009, in relation to interrogatories held not violative of the fourteenth amendment to the federal constitution, as authorizing a deprivation of property without due process of law.—Lawson v. Black Diamond Coal Min. Co., Wash., 86 Pac. Rep. 1120.

20. CONSTITUTIONAL LAW—Due Process of Law.—St. 1899, p. 111, ch. 94, providing for the service of process in actions against foreign corporations, held not invalid as depriving a foreign corporation of its property without due process of law.—Olender v. Crystalline Min. Co., Cal., 86 Pac. Rep. 1082.

21. CONSTITUTIONAL LAW — Legislative and Judicial Powers.—The power to determine in a given case whether a municipal corporation, professing to legislate under its general powers, has done so in accordance with the conditions of the grant, is judicial.—New Orleans & N. W. R. Co. v. Town of Vidalia, La., 42 So. Rep. 139.

22. CONSTITUTIONAL LAW — Sale in Bulk Act.—The "Sales in Bulk Act," Pub. Acts 1905, p. 322, No. 228, held a proper exercise of police power, and not to deprive one of property without due process in contravention of Const. art. 6, § 32.—Spurr v. Travis, Mich., 108 N. W. Rep. 1090.

23. CONSTITUTIONAL LAW—Statutory Provisions.—The Collateral Inheritance Tax Law, Act March 23, 1893, held not to deprive one of property without due process of law, in violation of the fourteenth amendment to the federal constitution.—Trippet v. State, Cal., 86 Pac. Rep. 1084.

24. CONTRACTS — Construction.—A mortgage to an insurance company and agency contracts executed and delivered at the same time and relating to the same subject-matter, must be considered together as one instrument.—Security Trust & Life Ins. Co. v. Ellsworth, Wis., 109 N. W. Rep. 125.

25. CONTRACTS—Support of Parent.—A contract for support of a relative held to entitle her to support wherever she chose to reside, and did not require such support to be furnished solely at the expense of the party with whom she did reside.—Payne v. Payne, Wis., 109 N. W. Rep. 105.

26. CONTRACTS—Support.—A contract of support held of benefit to the separate estates of certain married women, who were therefore entitled to join therein.—Payne v. Payne, Wis., 109 N. W. Rep. 105.

27. CONTRIBUTION—Joint Debtors.—Where a mortgage was given to secure a contract for support and was assumed by the purchaser on a sale of the land, such pur-

chaser was not a necessary party to a suit for contribution as between the persons jointly liable on such contract.—Payne v. Payse, Wis., 109 N. W. Rep. 105.

28. CORPORATIONS — Acounting by Directors.—That others equally guilty are not made parties held no defense in an action by a corporation against directors for an accounting for fraudulent transactions.—Brooklyn Heights Realty Co. v. Kurtz, 100 N. Y. Supp. 723.

29. CORPORATIONS—Recovery of Salary Paid.—Salary paid to president of corporation held not recoverable by corporation, though he controlled a majority of the stock as executor of deceased stockholder.—Hirsch v. Jones, 100 N. Y. Supp. 687.

30. CRIMINAL EVIDENCE—Appeal.—The affidavit of a juror in a criminal case though sufficient to show knowledge on his part of a newspaper article commenting on his being a juror in the case held insufficient to show that he was influenced by the article.—People v. Feld, Cal., 86 Pac. Rep. 1100.

31. CRIMINAL EVIDENCE—Direct Examination.—Where after the crime defendant left the state a question on direct examination as to why he left the state held properly excluded.—Rose v. State, Ala., 42 So. Rep. 21.

32. CRIMINAL LAW—Appeal.—A ruling on the ground that a true copy of the indictment was not served on defendant cannot be reviewed unless the indictment and copy are in the record.—Parham v. State, Ala., 42 So. Rep. 1.

33. CRIMINAL LAW—Appeal.—One convicted in a mayor's court of a crminal offense, who claims that an appeal bond was executed, as required by Code 1892, § 86, held required to tender a new bond before parol proof can be received of the execution of the original bond not sent up with the papers.—Polk v. Town of Seminary, Miss., 42 So. Rep. 129.

34. CRIMINAL TRIAL—Appeal.—To justify the granting of a new trial on the ground of newly discovered evidence in a criminal case the evidence newly discovered must be such as to render a different result probable in the event of a new trial.—People v. Feld, Cal., 86 Pac. Rep. 1100.

35. CRIMINAL TRIAL — Indictment and Information.—A verdict of guilty of manslaughter in the first degree operates as an acquittal of the higher offense charged.—State v. Smith, Iowa, 109 N. W. Rep. 115.

36. CRIMINAL TRIAL—Quashing Venire. — Where in a capital case it appeared that one whose name was on the list of jurors furnished defendant did not live in the county, held that his place was properly supplied, it being no ground for quashing the venire.—Skipper v. State, Ala., 42 So. Rep. 43.

37. CORPORATIONS—Performance of Legal Obligation.—The doing of that which the creditor of a corporation is required to do by law before he can maintain an action against the stockholders, is not a sufficient consideration to support a promise.— *In re* Lehnhoff's Estate, Neb., 109 N. W. Rep. 164.

38. CORPORATIONS—Powers of Stockholder.—Though two persons owned all the stock in a corporation one of them in his capacity as stockholder could not settle and discharge corporate claims against the other.—Petersen v. Elholm, Wis., 109 N. W. Rep. 76.

39. DEEDS—Record.—Where a grantor places his deed on record for the purpose, and with the intention, of passing title to his grantee pursuant to a valid agreement between them, the conveyance is valid without actual manual delivery and formal acceptance.—Fryer v. Fryer, Neb., 109 N. W. Rep. 175.

40. DISCOVERY — Examination of Adversary Before Trial.—In the absence of bad faith or abuse of process, a party is entitled to examine his adversary before trial as to facts which are material to the issue and of which he has knowledge.—McKeand v. Locke, 100 N. Y. Supp. 704.

41. DIVORCE—Proof of Former Marriage.—In a suit by a wife for divorce, land conveyed by her husband before the marriage in fraud of her marital rights, held subject to her claim as wife.—Ingram v. Ingram, Ala., 42 So. Rep. 24.

42. DOWER — Partnership Property. — The wife of a partner held to possess an inchoate right of dower in the partnership land acquired by the partner in his own name previously to the creation of the partnership.—Chase v. Angell, Mich., 108 N. W. Rep. 1105.

43. DRAINS—Establishment.—Where supervisors of a town, sitting as a special tribunal to establish a drain, lose jurisdiction by failure to perform a necessary step, their proceeding and determination is void, and may be attacked collaterally or directly. — Fraser v. Mulany, Wis., 109 N. W. Rep. 139.

44. DRAINS—Petition.— The jurisdiction to order the construction of a drain is acquired by filing with the board a petition by the landowners and an order by the board establishing the drain after hearing on due notice.—Alstad v. Sim, N. Dak., 109 N. W. Rep. 66.

45. DRAINS — Town Supervisors.—Where supervisors arbitrarily omitted lands directly benefitted by a public drain from the assessment, and assessed portions of the costs on lands not benefitted, either arbitrarily or fraudulently, the assessment was void. — Fraser v. Mulany, Wis., 109 N. W. Rep. 139.

46. DRUNKENNESS — Capacity to Commit Crime. — Drunkenness is no defense to a charge of manslaughter.—Laws v. State, Ala., 42 So. Rep. 40.

47. DRUNKENNESS—Specific Intent to Commit Crime.—Voluntary drunkenness held to excuse no man for the commission of a crime not involving a specific intent.—Laws v. State, Ala., 42 So. Rep. 40.

48. EASEMENTS—Deeds.— Strangers to certain deeds reserving a right of way, whose land all abutted on a public street, held not entitled to enforce such reservation for the purpose of obtaining a right of way over plaintiff's land.—Brace v. Van Eps, S. Dak., 109 N. W. Rep. 147.

49. EMINENT DOMAIN—Establishment.—The cutting of a ditch through the premises of an individual in the establishment of a drain, is a taking of property for which compensation must be made, unless a nuisance exists on the identical premises.—Fraser v. Mulany, Wis., 109 N. W. Rep. 139.

50. EMPLOYER'S LIABILITY ACT—Master and Servant.—In an action for injuries to a servant, the doctrine of an assumed risk held not eliminated by Employers' Liability Act, Laws 1902, p. 1750, ch. 600, § 3, though the negligence alleged was the master's failure to furnish statutory safeguards.—Kiernan v. Eidlitz, 100 N. Y. Supp. 731.

51. EQUITY—Setting Aside Submission.— Where, after trial and submission, the petition is amended so as to change the cause of action from one in equity to one at law, held the submission should be set aside and the cause set for trial by a jury.—Hartwig v. Iles, Iowa, 109 N. W. Rep. 18.

52. ESCROWS—Depositary.—A depositary of a check in escrow may prove any facts, in an action by the depositor, to defeat the depositor's claim to the check and show the title thereto to be in payee.—Brockway v. Reynolds Neb., 109 N. W. Rep. 154.

53. EVIDENCE — Inconsistent Statements — Where a witness has denied making contradictory statements, held, that he cannot state what he said until evidence as to the statements in question has been introduced.—Cathcart v. Webb & Morgan, Ala., 42 So. Rep. 25.

54. EVIDENCE—Judicial Notice.—Judicial notice will be taken of the method of sale of public lands, the issue of patents, and the uniform method of numbering and designating sections and their subdivisions. — Kimball v. McKee, Cal., 86 Pac. Rep. 1089.

55. EVIDENCE—Mortgaged Premises.—In proceedings to condemn a railroad right of way over mortgaged land, the mortgagee held not bound by any agreement between the railroad company and the mortgagor, or by appraisal in condemnation proceedings. — Stamnes v. Milwaukee & S. L. Ry. Co., Wis., 109 N. W. Rep. 100.

56. EVIDENCE—Parol Evidence.—Parol evidence showing that the abbreviation "Pt" following the name of

the drawee in a draft was suggestive of his official position as president of a bank held admissible.—Griffin v. Erskine, Iowa, 109 N W. Rep. 13.

57. EXECUTORS AND ADMINISTRATORS—Appointment.—The judgment of the probate court that a creditor of a decedent was entitled to letters of administration, held not open to collateral attack.—Ackerman v. Pfent, Mich., 108 N. W. Rep. 1084.

58. EXECUTORS AND ADMINISTRATORS — Presentation of Claims.—Where a trust fund was established by a decree of a court having jurisdiction and was accepted by intestate, it was not necessary for the parties entitled thereto to present their claim to the money against intestate's estate in order to entitle them to recover the same.—Kauffman v. Foster, Cal., 86 Pac. Rep. 1108.

59. HIGHWAYS—Control.—In the absence of a special constitutional restraint, and subject to the rights of abutting owners, the state legislature has full paramount authority over all public ways and places.—Scovel v. City of Detroit, Mich., 109 N. W. Rep. 20

60. HOMICIDE—Evidence.—Evidence of threats of defendant against deceased held admissible in a homicide case where there is evidence to take to the jury the question of proof of the *corpus delicti*.—Parham v. State, Ala., 42 So. Rep. 1.

61. HUSBAND AND WIFE—Contracts of Wife.—Where a wife contracts an indebtedness on her own credit, the husband's mere promise to pay is a promise to answer for the debt of another without consideration.—Shuman v. Steinel, Wis., 109 N. W. Rep. 74.

62. HUSBAND AND WIFE — Evidence in Mitigation of Damages.—In an action for criminal conversation, that plaintiff continued to cohabit with his wife after the alleged intercourse may be considered in mitigation of damages.—Smith v. Hockenberry, Mich., 109 N. W. Rep. 23.

63. HUSBAND AND WIFE — Liability Created. — A wife executing a note jointly with her husband held not benefitted thereby, and not liable thereon at law.—Merrell v. Purdy, Wis., 109 N W. Rep. 82.

64. INJUNCTION— Restraining Transfer of Stock.—An injunction restraining defendant from voting on or exercising any rights incident to the ownership of stock pending the suit held not authorized.—Maine Product Co. v. Alexander, 100 N. Y. Supp. 711.

65. INNKEEPERS—Injury to Guest.—An innkeeper is not liable for injuries received by a guest through falling down steps while groping his way through a dark passageway.—Dailey v. Distler, 103 N. Y. Supp. 679.

66. JUDGMENT—Breach of Covenants.—In an action for breach of the covenants of a deed, a judgment in a former action held conclusive against a contention that the purchaser of the land at tax sale had purchased for the benefit of plaintiff.—Patterson v. Cappon, Wis., 109 N. W. Rep. 103.

67. JUDGMENT—Fraud.—The power of the county court to vacate a judgment or order, held not limited to a year, when based on fraud or want of jurisdiction.—Parsons v. Balson, Wis., 109 N. W. Rep. 136.

68. JUDGMENT—Jurisdiction. — Where a decree of a court of competent jurisdiction distributed a trust fund to an association to which it was bequeathed, it would be presumed in support of the decree that the distributee had power to accept and was competent to act as trustee.—Kauffman v. Foster, Cal., 86 Pac. Rep. 1108.

69. JUDGMENT—Levy of Execution.—A levy of an execution on the real estate of the debtor, is not *prima facie* satisfaction of the judgment.—Ackerman v. Pfent, Mich., 108 N. W. Rep. 1084.

70. JURY—Special Venire.—A record in a criminal case which shows that the special venire was drawn by "the judge of this court" shows a compliance with the statute requiring the venire to be drawn by the "presiding judge."—Laws v. State, Ala., 42 So. Rep. 40.

71. LANDLORD AND TENANT—Landlord's Lien.—One who did not take part in sale of goods on which a landlord had a lien, but merely received part of the price, held not liable for damages to the landlord.—Hartwig v. Iles, Iowa, 109 N. W. Rep. 18.

72. LIMITATION OF ACTIONS—Time for Making Delivery.—The time of the making and delivery of an antedated note payable on demand held to fix the period for the commencement of the running of limitations.—Webber v. Webber, Mich., 109 N. W. Rep. 50

73. MANDAMUS—Alternative Writ.—The supreme court on appeal from an order denying an alternative writ of *mandamus* to compel the issuance of execution on a judgment will not grant an alternative writ after the judgment has become dormant under Code 1896, § 1880.—Norwood v. Clem, Ala., 42 So. Rep. 6.

74. MANDAMUS — Condition of Awarding Writ. — In *mandamus* to compel the reinstatement of relator in a municipal office, the court held to have no power to attach a condition that he should waive all claims for back salary.—People v. Ahearn, 100 N. Y. Supp. 716.

75. MARRIAGE—Notes of Wife.—A married woman held not liable at law on a note executed with her husband to procure the release of a mortgage securing his individual debt.—Bailey v. Fink, Wis., 109 N. W. Rep. 86.

76. MASTER AND SERVANT — Assumption of Risk.—Where an infant employee who had reached the age of discretion gave assurances that he understood his duties, the employer was not obliged to give him any special instructions.—King v. Woodstock Iron Co., Ala., 42 So. Rep. 27.

77. MASTER AND SERVANT—Injuries to Servant.—A cager in a mine held to have assumed the risk of injury from a loaded car of coal permitted to run from a gallery to the shaft.—Sommers v. Standard Min. Co., Mich., 109 N. W. Rep. 80.

78 MASTER AND SERVANT—Hazardous Occupation.—A servant engaged in a hazardous occupation assumes the risk of injury to from all its obvious dangers.—Anderson v. Union Stock Yards Co., Neb., 109 N. W. Rep. 171.

79. MINES AND MINERALS — Public Mineral Lands.—A discovery of a vein or lode on unoccupied and unappropriated mineral lands of the United States, is a prerequisite to a valid location of a mining claim.—Lockhart v. Farrell, Utah, 86 Pac. Rep. 1077.

80. MORTGAGES—Foreclosure.—A redemption from a mortgage sale by a junior incumbrancer operates as an assignment of the rights of the purchaser. The redemptioner acquires the title if there is no other redemption.—Franklin v. Jameson-Wohler, N. Dak., 109 N. W. Rep. 56.

81. MUNICIPAL CORPORATIONS—Injury to Pedestrian.—A city held not liable for injuries received by a pedestrian in consequence of a billboard on private ground thrown against him by the wind.—Temby v. City of Ishpeming, Mich., 108 N. W. Rep. 1114.

82. MUNICIPAL CORPORATIONS—Liability for Damages.—A municipal corporation held liable for damages to plaintiffs' premises from the giving away of a reservoir without proof of negligence on its part.—Wiltse v. City of Red Wing, Minn., 109 N. W. Rep. 114.

83. MUNICIPAL CORPORATIONS—Nonuser of Franchise.—A municipal corporation does not lose its existence by nonuser of its franchise.—Elliott v. Pardee, Cal., 86 Pac. Rep. 1087.

84. MUNICIPAL CORPORATIONS—Ordinance of Town — An ordinance of a town, extending its boundaries to include within its limits property of defendant corporation immediately adjacent to the boundary, held not unreasonable.—New Orleans & N. W. R. Co. v. Town of Vidalia, La., 42 So. Rep. 189.

85. MUNICIPAL CORPORATIONS—Street Improvements.—A special indebtedness for a street improvement created by a void municipality, cannot after the legal creation of the municipality be converted into a general liability.—State v. Moss, Wash., 86 Pac. Rep. 1129.

86. NAVIGABLE WATERS—Pollution.—Pollution of the waters of New York harbor by a sewer permitted to exist in a bad state of repair, so as to prevent plaintiff from successfully operating his bathing beach, held actionable.—Connolly v. City of New York, 100 N. Y. Supp. 673.

87. NEGLIGENCE—Fires.—After discovering a fire on his premises for the kindling of which he is not responsible, the landowner is not bound to exercise more than ordinary care to prevent it from spreading.—Baird v. Chambers, N. Dak., 109 N. W. Rep. 61.

88. NUISANCE—Mail Sacks.—Mail bags negligently left in close proximity to the highway by a railroad company for an unreasonable length of time held to constitute a nuisance.—Horr v. New York, N. H. & H. R. Co., Mass., 78 N. E. Rep. 776.

89. OFFICERS—Payment of Salary.—A municipal corporation having paid to a *de facto* officer the salary due at the time of payment, and before judgment of ouster, held not subsequently liable for such salary to the *de jure* officer.—Samuels v. Town of Harrington, Wash., 86 Pac. Rep. 1071.

90. PARENT AND CHILD—Wages of Child.—If a father permits his son to receive his wages as his own, they become the property of the son.—Merrill v. Hussey, Me., 64 Atl. Rep. 819.

91. PARTNERSHIP—Contract.—Where the parties to a partnership contract treated plaintiff's right to one-third of the profits solely as compensation for his investment, no part of such profits could be treated as additional compensation to plaintiff for services to the firm.—Ramsay v. Meade, Colo., 86 Pac. Rep. 1018.

92. PARTNERSHIP—Dissolution.—Real estate of a firm held, on its dissolution, subject to compulsory partition on it being shown that it will not be required to satisfy firm debts.—Chase v. Angell, Mich., 108 N. W. Rep. 1105.

93. PARTNERSHIP—Settlement by Partner.—A settlement by a partner for services rendered the firm by a third person held binding on the copartner.—Webber v. Webber, Mich., 109 N. W. Rep. 50.

94. PAYMENT—Application.—A creditor which had elected to apply a credit on one of the debtor's notes on which there was a surety, held not entitled to withdraw the same without authority from the surety.—Mitchell v. Wheeler, Iowa, 108 N. W. Rep. 1030.

95. PLEDGES—Amount of Recovery.—In an action on a note held as collateral, plaintiff held not entitled to a judgment for the face of the note, but only for the amount of the debt secured.—Bank of Montreal v. Howard, Wash., 86 Pac. Rep. 1115.

96. PLEDGES—Foreclosure of Collateral by Pledgee.—One to whom notes secured by real estate mortgage were pledged held to have acquired title to the mortgage property for its own benefit by foreclosure, and so bound to account to the pledgor on the basis of its bid at foreclosure sale.—Munson v. American Sav. Bank & Trust Co., Wash., 86 Pac. Rep. 1047.

97. PRINCIPAL AND AGENT—Fraud of Agent.—Where one who is acting for himself and another in procuring a conveyance was guilty of fraudulent representations in procuring it, the latter had notice of the fraud and is liable therefor.—Kendrick v. Colyar, Ala., 42 So. Rep. 110.

98. PRINCIPAL AND AGENT—Powers of Agent.—Where a debtor delivered a draft in payment of his debt to the president of a bank appointed by the creditor as agent, to collect the debt, the debtor was not liable for the president's misappropriation of the sum paid.—Griffin v. Erskine, Iowa, 109 N. W. Rep. 18.

99. PUBLIC LANDS—Patent.—Where the holder of a state patent entered with internal improvement warrants consents to the cancellation of his entries and authorizes the delivery of the warrants to a third person, the title to the lands first entered becomes again vested in the state, and cannot be sold for taxes.—Slattery v. Glassell, La., 42 So. Rep. 135.

100. QUIETING TITLE—Relief Decree.—Equity, is a suit to quiet title founded on a tax deed, has jurisdiction to enter a decree permitting defendant to redeem and requiring complainant to quitclaim to defendant, though the latter asks for no affirmative relief.—Miller v. Steele, Mich., 109 N. W. Rep. 87.

101. RAILROADS—Accident at Crossing.—A bridge which runs up to the cross-ties of a railroad at a public road crossing held such an approach as the railroad company is required to keep in repair.—Southern Ry. Co. v. Morris, Ala., 42 So. Rep. 19.

102. REFORMATION OF INSTRUMENTS—Mistake.—In an action to reform a contract giving plaintiff an easement, evidence held to show mistake of draftsman whereby contract failed to express mutual intent of parties.—Thomas v. Robinson, Ky., 96 S. W. Rep. 429.

103. REFORMATION OF INSTRUMENTS—Relief Awarded.—A decree correcting a conveyance of a railroad right of way, held to require as a condition precedent that the railroad company performed its agreement entered into in consideration of the conveyance.—Champion v. Grand Rapids, G. H. & M. Ry. Co., Mich., 108 N. W. Rep. 1078.

104. RELIGIOUS SOCIETIES—Trusts.—A trust affecting church property held to result from the payment of the money by the members of the church for the erection of a building.—Lee v. Methodist Episcopal Church, Mass., 78 N. E. Rep. 646.

105. SALES—Action for Price.—Where the purchaser of wood accepted some delivered but not as a compliance with the contract, held that the seller could only recover its value at the time of delivery.—Duvall v. Ferwerda, Mich., 108 N. W. Rep. 1115.

106. SALES—Action for Price.—A buyer cannot in an action for the agreed price, show that the goods bought were not worth what he promised to pay for them.—Julius Kessler & Co. v. Zacharias, Mich., 108 N. W. Rep. 1012.

107. SALES—Caveat Emptor.—The rule *caveat emptor* held not to apply where the purchaser is ignorant of the value of the article purchased, but relies on the seller's knowledge and representations.—Lyon v. Lindblad, Mich., 108 N. W. Rep. 969.

108. SALES—Conditional Sales.—Where a mule was sold under a contract reserving title until the price was paid, the seller did not waive such title as against subsequent purchasers by taking a trust deed covering the mule and other property to secure the price.—Greenwald & Champenois v. Tinsley, Miss., 42 So. Rep. 89.

109. SCHOOLS AND SCHOOL DISTRICTS—Contracts with Teachers.—A provision in a contract between a school district and a teacher, authorizing the teacher's dismissal at any time, on 30 days' notice, was not beyond the power of the district.—Dees v. Board of Education of City of Detroit, Mich., 109 N. W. Rep. 89.

110. SPECIFIC PERFORMANCE—Leases.—In an action to enforce specific performance of an agreement to execute a sublease, the court held to have had jurisdiction of the real parties in interest.—Capps v. Frederick, Wash., 86 Pac. Rep. 1128.

111. STREET RAILROADS—Excessive Speed.—The running of a street car in the streets of a populous city at a speed in excess of that prescribed by ordinance is simple negligence merely, and not wantonness or willfulness.—Anniston Electric & Gas Co. v. Elwell, Ala., 42 So. Rep. 45.

112. STREET RAILROADS—Injury to Child on Highway.—In lawfully using a highway concurrently with a street railway company, a child held required to exercise only such care as a prudent child of his years under like circumstances would have exercised.—Burns v. Worcester Consol. St. Ry. Co., Mass., 78 N. E. Rep. 740.

113. STREET RAILROADS—Regulation of Cars at Railroad Crossings.—A city ordinance regulating the operation of cars approaching railroad crossings construed, and held not to require the stopping of cars between two railroad tracks crossing the street car track.—Bartholomaus v. Milwaukee Electric Ry. & Light Co., Wis., 109 N. W. Rep. 143.

114. TAXATION—Power of Board.—The state board of tax commissioners has only such power with reference to the assessment of property for taxation and the equalization of assessments as is derived from statute.—Bell v. Meeker, Ind., 79 N. E. Rep. 641.

115. TELEGRAPHS AND TELEPHONES — Unreasonable Delay in Delivering Message.—Where it was admitted that a message would be received at destination almost instantly from the time it was put on the wires at the sending office, a delay in transmission of two hours was unreasonable.—Western Union Telegraph Co. v. McClelland, Ind., 78 N. E. Rep. 672.

116. TRADE-MARKS AND TRADE-NAMES—Fair Competition.—Certain advertisements by employee and officer of a company on starting business of his own held to constitute fair competition.—United States Frame & Picture Co. v. Horowitz, 100 N. Y. Supp. 705.

117. TRIAL—Evidence.—In trespass for the taking of certain goods, defendants held entitled to an affirmative charge based on a plea on which issue was joined, which was proved without conflict of evidence.—C. H. Gilliland & Son v. Martin, Ala., 42 So. Rep. 7.

118. TRIAL—Security for Costs.—The filing of security for costs by contestant held not to justify a trial of the case in contestant's absence on a date previously set without a further notice of trial to him.—*In re* Dean's Estate, Cal., 87 Pac. Rep. 13.

119. TRUSTS—Intestate's Administration.—A trust fund invested by intestate held sufficiently identified to enable the parties entitled thereto to follow and recover it from intestate's administrator.—Kauffman v. Foster, Cal., 86 Pac. Rep. 1108.

120. TRUSTS—Vendor's Lien.—A tenant held to hold the legal title of his co-tenant's interest in trust for the benefit of a third person under contract for the purchase of the same, and for the security of the co-tenant for the purchase price.—Wood v. Schoolcraft, Mich., 108 N. W. Rep. 1075

121. TRUSTS—Wages of Child.—Where a father takes money of his minor sons without their consent, and uses it in payments on a farm, no resulting trust arises —Merrell v. Hussey, Me., 64 Atl. Rep. 819.

122. VENDOR AND PURCHASER—Damages.—Where the interest of a tenant in common is sold by the co-tenant, the amount due on the contract of sale is the measure of the tenant's right against the purchaser, and the measure of damages against the co-tenant —Wood v. Schoolcraft, Mich., 108 N. W. Rep. 1075.

123. VENDOR AND PURCHASER — Fraud.—Where purchaser of fruit farm continued to make payments after discovering fraud, abandonment and attempted rescission held not to entitle him to recover payments made.—Mestler v. Jeffries, Mich., 108 N. W. Rep. 994.

124. VENDOR AND PURCHASER — Liability For False Representations.—One who executed a contract for a sale of land merely because the title was in his name held not liable for the false representation of the real owner who made the sale.—Freeman v. Gloyd, Wash., 86 Pac. Rep. 1051.

125. VENDOR AND PURCHASER — Notice of Defective Title.—A person attacking the title of one who has paid value, has the burden of showing that the purchaser had notice of the defect in his grantor's title.—Kendrick v. Colyar, Ala., 42 So. Rep. 110.

126. VENDOR AND PURCHASER—Vendor's Lien.—Where one without authority buys land for and takes a deed in the name of another, giving his personal note for the price, and his act is not ratified, held, that no lien was created by the note.—Jones v. Laird, Ala., 42 So. Rep 26.

127. WAREHOUSEMEN—Care of Merchandise.—A warehouseman for hire held liable for damage to skins while in cold storage, unless the damage resulted from causes for which it was not responsible.—Herzig v. New York Cold Storage Co., 100 N. Y. Supp. 603.

128. WAREHOUSEMEN — Liability for Loss.—A warehouseman held liable for the true value of a box lost while stored with him, notwithstanding a provision in the receipt limiting liability.—Gannon v. Seehorn, Wash , 86 Pac. Rep. 1116.

129. WATERS AND WATER COURSES—Appropriation.—A person making an appropriation of water from a natural stream held entitled to make use of any natural or artificial channel available for the purpose of conducting the water.—Lower Tule River Ditch Co. v. Angiola Water Co., Cal., 86 Pac. Rep. 1081.

130. WATERS AND WATER COURSES—Irrigation.—A corporation organized to operate an irrigation ditch held not entitled to recover from a co-owner, not a member of the corporation, a share of the cost of repairing the ditch below such owner's point of diversion at common law or under St. 1889, p. 202, ch. 168.—Arroyo Ditch & Water Co. v. Bequette, Cal., 87 Pac. Rep. 10.

131. WATERS AND WATER COURSES—Municipal Water Supply Regulations.—Whether city offered to other tenants of a building a contract or application provided in its scheme of furnishing water to the inhabitants, held immaterial to the rights of a tenant who paid his proportion of the water rates.—Cox v. City of Cynthiana, Ky., 96 S. W. Rep. 456.

132. WATERS AND WATER COURSES—Overflow. —The overflow waters of a stream, especially where they run in a well defined course and again unite with the stream at a lower point must be regarded as a part of the water course from which the overflow comes, and cannot be regarded or dealt with as surface water.—Brinegar v. Copass, Neb., 109 N. W. Rep. 178.

133. WATERS AND WATER COURSES—Persons Entitled to Contract Rates.—Persons who resided beyond the limits of a city when a contract for water was made with a water company, but who were subsequently brought into the city by an extension of the corporate limits, where entitled to water at the contract rates.—City of Birmingham v. Birmingham Waterworks Co , Ala , 42 So. Rep. 10.

134. WATERS AND WATER COURSES — Public Water Supply.—A waterworks company held liable to a taxpayer whose property is destroyed by fire on account of negligence in not furnishing water —Mugge v. Tampa Water Works Co., Fla., 42 So. Rep. 81.

135. WILLS—Amendment to Set Aside Probate of Will. —Amendment of petition to set aside probate of a will, so as to set up petitioner's rights as an after-born child and to ask that the order assigning the real estate be set aside, held properly allowed.—Parsons v. Balson, Wis., 109 N. W. Rep. 136.

136. WILLS—Construction. — A repugnancy between clauses of a will will not be raised by construction, but the instrument will, if possible, be so interpreted as to give effect to all its provisions.—Martley v. Martley, Neb., 108 N. W. Rep. 979.

137. WILLS—Estate Devised.—Where a testator gave a life estate in certain property to his wife, remainder to his daughter, and on her death to her heirs, and, in case of her death without issue living, to her brother and sisters equally, she took a vested remainder on testator's death under the rule in Shelley's case.—Burton v. Carnahan, Ind., 78 N. E. Rep. 682.

138. WITNESSES | Contradictory Statements.—The rule that a party who is surprised by the testimony of a witness whom he has called may show contradictory statements previously made applies in a criminal as well as a civil case.—State v. Sederstrom, Minn., 109 N. W. Rep. 113.

139. WITNESSES — Cross Examination. — A question asked of a witness on cross-examination as to whether, having known plaintiff for 25 years, he rode in a railroad train with her from F to H without speaking to her, held properly disallowed.—Southern Ry. Co. v. Cothran, Ala., 42 So. Rep. 109.

140. WITNESSES—Examination.—To permit the prosecuting attorney to ask the prosecutrix a certain question with respect to changing her testimony given on cross-examination held not error.—People v. Murphy, Mich., 108 N. W. Rep. 1009.

141. WITNESSES—Husband and Wife.—A husband cannot be a witness for or against the wife in matters affecting her paraphernal rights.—Bianchi v. Del Valle, La., 42 So. Rep. 148.